Australian Chamber of Commerce and Industry

ACCI Submission

Modern Awards Review 2023-24

Making Awards Easier To Use

22 December 2023

Australian Chamber of Commerce and Industry

Working for business.

Working for Australia.

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1 Introduction

Background

1.1. The Modern Awards Review 2023-24 (**Review**) was commenced on receipt of a letter to the President of the Fair Work Commission (**Commission**) from the Minister for Employment and Workplace Relations (**Minister**).[1] In that letter, the Minister expressed a desire for the Commission to use "the review to identify what parties believe could be done to make awards easier to use".[2] This was because the Minister, invoking a consideration under the modern awards objective,[3] considers it "critically important that the modern award system be easy to understand, stable, and sustainable."[4]

1.2. ACCI has long expressed a view that modern awards are difficult to use – both for employers and employees. This complexity is a key cause of wage underpayments and noncompliance with award obligations in Australia. It also hinders productivity as businesses are forced to needlessly divert time and resources into regulatory compliance instead of core business activities and improved conditions for employees.

1.3. This submission advances proposals in respect of the seven awards identified by the Commission for the purposes of this stream of the Review (the **Common Awards**).[5] These proposals would alleviate some, but certainly not all, of the difficulty employers face in using modern awards. The constraints imposed on ACCI and other employer associations by Government have limited the breadth of proposals advanced as part of this Review. These constraints are discussed below.

Employer Engagement

1.4. ACCI appreciates the opportunity to advance proposals as part of this Review. However, in the current environment, ACCI is concerned about employers' current capacity for engagement with the Review process. Feedback from ACCI members is that their resources are encumbered by the implementation of significant changes to the *Fair Work Act 2009* (Cth) (**FW Act**). These changes include those passed by the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* (Cth), the imminent changes that have and will result from the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth), and continued advocacy in respect of the proposed Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 (Cth). The current focus of employer associations has been to support businesses in understanding and complying with these significant changes to workplace laws.

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[1] Justice Hatcher, Fair Work Commission, *President's Statement on Modern Awards Review 2023-24* (15 September 2023) [1].
[2] Minister for Employment and Workplace Relations, Letter to the Hon Justice Adam Hatcher (12 September 2023) 2.
[3] See *Fair Work Act 2009* s 134(1)(g).
[4] See ibid.
[5] Justice Hatcher, Fair Work Commission, *President's Statement on Modern Awards Review 2023-24* (15 September 2023) [10(1)].

1.5. The Commission should recognise the constrained capacity of employers when producing its final report. A lack of proposals advanced by employer groups should not be construed as a lack of concern about award usability.

Worker Entitlements

1.6. In his letter, the Minister stated that the Review "outcomes should not result in any reduction in worker entitlements".[6] In his statement, the President confirmed that this condition would apply to the Review, stating that:

> Parties will be invited to advance any proposals to make modern awards easier to use *while not reducing entitlements for award-covered employees*.[7]

1.7. From the outset, ACCI does not propose to reduce worker entitlements – that is the safety net that protects award-covered employees. However, it is inevitable that in reply submissions union parties will seek to rebut our proposals by arguing that, if adopted, they would reduce worker entitlements. Their argument will be that because a worker is *entitled* to enforce some aspect of an award clause that would be removed under the proposal, workers' "entitlements" would be reduced. This longstanding argument could be applied to any proposal to vary an award, so it unnecessarily stands as a barrier to true reform to our award system.

1.8. A critical distinction must be drawn between *substantive* worker entitlements, such as minimum wages or overtime rates, and award obligations that are predominately *procedural* or *facilitative* in nature. Although the latter might, in a literal sense, be capable of being described as *entitling* an employee to something, they are not true "entitlements" in the sense contemplated by the Review, or in the sense which would be commonly understood by the community-at-large.

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

1.10. Consider, for example, the requirement under the *Clerks – Private Sector Award 2020* for a written agreement for an employee to take time off instead of receiving payment for overtime to specifically state "that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked".[8] Irrespective of whether you accept an argument that this requirement should be removed, the ability of an employee to enforce this requirement or pursue civil penalties against an employer who breaches it and thereby the award, is clearly not a "worker entitlement". This requirement is of a procedural nature; in

[6] Minister for Employment and Workplace Relations, Letter to the Hon Justice Adam Hatcher (12 September 2023) 1.
[7] Justice Hatcher, Fair Work Commission, *President's Statement on Modern Awards Review 2023-24* (15 September 2023) [10(1)] (emphasis added).
[8] *Clerks – Private Sector Award 2020* cl 23.3(c).

practice, it does not *entitle* an employee to any actual working arrangement or remuneration. It merely provides the worker with a cause of action if the employer fails to comply with certain procedural requirements.

1.11. ACCI urges the Commission to not be so constrained by the condition that the Review should not result in any reduction in worker entitlements that it is incapable of considering meaningful improvements to the usability of awards.

Key Problems in Awards

1.12. The qualitative research prepared by Sweeney Research for the conduct of the 4-yearly review of modern awards identified some of the primary obstacles to award usability and compliance.[9] While some of these were addressed or partly improved during that process, in our submission, they remain predominately unremedied more than nine years later.

1.13. Of particular relevance, the research showed that for small businesses, inter alia:

- "[t]he sheer volume of the documents presented an initial barrier for many operators";[10]
- due to their volume, modern awards "were seen to be daunting, and cued a 'typical' government document that was likely to be verbose and unwieldy";[11]
- the "[d]ensity of content" was a key issue because "[t]he text heavy presentation elicited concerns amongst participants about how long it would take to read and comprehend the document";[12] and
- "[r]educed document length" was one of the reported "[s]tandout improvements", with "a desire for the [documents] to be shortened further".[13]

1.14. The length of modern awards is a key problem that can be addressed in the context of the Review. This is partly because it often will not involve disturbing any worker entitlements.

1.15. The Commission recognised that in the simplification of some award clauses, an unfortunate consequence was that it "extended the length of some modern awards, as complex clauses [were] 'unpacked' into subclauses and expressed in plain language."[14] While this will sometimes be a justifiable by-product of meritorious award variations, it does contribute to another problem that impedes award usability. Resultingly, there remains considerable opportunities for remedying this issue.

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[9] Sweeney Research, *A Qualitative Research Report on: Citizen Co-Design with Small Business Owners* (Report, 13 August 2014)
[10] Ibid 19.
[11] Ibid 19.
[12] Ibid 19.
[13] Ibid 26-27.
[14] *Re 4 yearly review of modern awards* [2020] FWCFB 810 [9].

1.16. Another key problem is the different understandings that exist of the purpose of modern awards. For instance, although dealing with relatively minor issues, the *Modern awards superannuation clauses review* (AM2022/29) proceedings exposed a fundamental difference in views by various industrial parties of the purpose of modern awards.

1.17. In those proceedings, it became evident that some peak bodies consider a purpose of modern awards to serve as an explanatory guidance document. For instance, on this view, it would be necessary not only for modern awards to stipulate minimum terms and conditions of employment, but also how they might be applied in practice and where parties should look for further information.[15]

1.18. In our submission, this conception of the purpose of awards should be rejected both for modern award matters at large and, in particular, in the Review. As is needless to repeat, modern awards are intended to be a "fair and relevant minimum safety net of terms and conditions".[16] They are not guidance documents, nor are they designed to be comprehensive statements of the terms and conditions afforded to employees. On the basis of these same propositions, the Commission has consistently sought to minimise duplication of the National Employment Standards (**NES**) in modern awards.[17]

1.19. The rejection of this alternative conception of the purpose of modern awards should guide the Commission's approach to the Review. Where possible, aspects of modern awards that are intended to be *informative* instead of creating a safety net of terms and conditions should be discarded, unless they are absolutely necessary for operation of the award provisions.

ACCI Proposals

1.20. The proposals advanced in this submission seek to address the issues in modern awards identified above and elsewhere.

1.21. We recognise that many of the proposals advanced in this submission relate to issues that have been previously the subject of dispute or review before the Commission, particularly during the course of the 4-yearly review of modern awards. Of course, while the Commission is not bound by principles of stare decisis, it will generally follow previous Full Bench decisions "in the absence of cogent reasons for not doing so" "as a matter of policy and sound administration".[18]

1.22. Nevertheless, these issues are worth revisiting. There are cogent reasons for not simply reaffirming the relevant past decisions of the Commission in relation to them. These cogent reasons are outlined in this submission but also include the broader fact that, as recognised by the Minister, it is "critically important

[15] See, eg, Australian Council of Trade Unions, *Modern awards superannuation clauses review* (AM2022/29) (Position Paper, 4 August 2023) 1.
[16] *Fair Work Act 2009* (Cth) s 134(1).
[17] See *Re Minister for Employment and Workplace Relations* [2008] AIRCFB 1000 [34].
[18] *Cetin v Ripon Pty Ltd* (2003) 127 IR 205, 214 [48] (Ross VP, Duncan SDP, Roberts C).

that the modern award system be easy to understand, stable, and sustainable",[19] which, given the need for the Review, is evidently not being achieved at present.

1.23. In relation to employer concerns about the sheer volume of awards, we note that, were all of ACCI's proposals accepted, considerable improvement to awards on this metric would be made. For instance, in our estimation, the substantive part of the *Clerks – Private Sector Award 2020* (i.e., the part of the award prior to schedules A-G) would be reduced in length by approximately 18%.

1.24. This submission will proceed through each proposal advanced by ACCI and seek to provide a justification for them. For the benefit of the Commission and other parties, Annexure 1 lists the proposals without the accompanying submissions and Annexure 2 compares the proposed clauses with the existing clauses in a table.

[19] See ibid.

2 Superannuation Clauses

Proposal A

2.1. The superannuation clauses all seven of the Common Awards should be replaced with a new clause which appears as follows:

> **X.1 Superannuation**
>
> Superannuation entitlements are provided for in the NES and under superannuation legislation.
>
> **X.2 Default funds**
>
> Unless an employer is required by superannuation legislation to make contributions to another fund for the benefit of an employee (for example, a stapled fund), the employer must satisfy the NES requirements by making contributions to one of the following superannuation funds or its successor, provided that, in respect of new employees, the fund is able to accept new beneficiaries:
>
> (a) [Default Fund A]
>
> (b) [Default Fund B]
>
> …
>
> **X.3 Absence from work while receiving workers compensation**
>
> Subject to the governing rules of the relevant superannuation fund, the employer must make the superannuation contributions required by the NES and pay the amounts authorised by any salary sacrifice arrangement for the period of absence from work (subject to a maximum of 52 weeks) of an employee due to work-related injury or work-related illness provided that:
>
> (i) the employee is receiving workers compensation payments or is receiving regular payments directly from the employer in accordance with statutory requirements; and
>
> (ii) the employee remains employed by the employer.

2.2. The default funds that are currently specified in each Common Award should be specified in the new clause X.2.

Submissions

2.3. Proposal A should be adopted for the following reasons.

Statutory Requirements

2.4. Proposal A satisfies the statutory requirements that apply to superannuation clauses in modern awards.

2.5. Division 3 of part 2-3 of the *Fair Work Act 2009* (Cth) stipulates the terms that may, must and may not be included in modern awards. Relevantly, sections 149B, 149C, and 149D impose statutory requirements on the terms that must be included in modern awards relating to superannuation.

2.6. However, these three provisions do not presently apply to any industry or occupational award. This is because of the transitional arrangements in the *Fair Work Act 2009* (Cth) that stipulate that sections 149B, 149C(1), and 149D only "apply in relation to a modern award that … is made on or after 1 January 2014" or a modern award that "is made before 1 January 2014 and that is varied on or after that day" in a 4 yearly review of default fund terms.[20]

2.7. The same transitional arrangements further provide that, "[d]espite the repeal of sections 149A and 155A … those sections continue in force in relation to a modern award that … is made before 1 January 2014; and … is not varied on or after that day" in a 4 yearly review of default fund terms.[21]

2.8. To date, a 4 yearly review of default fund terms has not been successfully completed.

2.9. With no modern awards having been varied in a 4 yearly review of default fund terms, the effect of these transitional arrangements is that the former provisions of sections 149A and 155A apply to all industry and occupational awards rather than the new provisions of sections 149B, 149C, and 149D.

2.10. As a result, the statutory requirements pertaining to superannuation clauses in modern awards are relatively simple.

2.11. First, pursuant to section 149A, each modern award "must include a term that permits an employer covered by the award to make contributions to a superannuation fund or scheme in relation to a default fund employee" who is both "covered by the award" and "a defined benefit member of the fund or scheme".[22] The provision further defines "default fund employee" as an employee who "has no chosen fund within the meaning of the *Superannuation Guarantee (Administration) Act 1992*".[23]

2.12. If an employee provides their employer (or the Commissioner of Taxation) with written notice expressing their desire for a particular superannuation fund to be their "chosen fund", then it becomes so.[24] Accordingly, an employee will have "no chosen fund within the meaning of the *Superannuation Guarantee (Administration) Act 1992*" (and thereby a "default fund employee" pursuant to section 149A) where they fail to provide such written notice.

2.13. Proposal A thus satisfies this statutory requirement. Clause X.2 "permits an employer covered by the award to make contributions to a superannuation fund or scheme in relation to a default fund employee"[25] by allowing (and in fact, more forcefully, *obligating*) an employer to make contributions to one of the

[20] *Fair Work Act 2009* (Cth) sch 3 item 2(1).
[21] *Fair Work Act 2009* (Cth) sch 3 item 2(2).
[22] *Fair Work Act 2009* (Cth) s 149A(1) (repealed by *Fair Work Amendment Act 2012* (Cth)).
[23] Ibid s 149A(2) (repealed by *Fair Work Amendment Act 2012* (Cth)).
[24] *Superannuation Guarantee (Administration) Act 1992* (Cth) s 32F(1).
[25] *Fair Work Act 2009* (Cth) s 149A(1) (repealed by *Fair Work Amendment Act 2012* (Cth)).

specified default funds. The proposed clause does so "in relation to a default fund employee"[26] because the obligation would not apply if the "employer is required by superannuation legislation to make contributions to *another* fund for the benefit of an employee" (emphasis added). If an employee has a chosen fund, the employee is not "a default fund employee".[27] In such circumstances, the "employer is required by superannuation legislation to make contributions to another fund for the benefit of an employee" because the employer must make contributions to that chosen fund rather than a default fund specified in the award.

2.14. Second, pursuant to section 155A, modern awards are prohibited from including a term that "has the effect of requiring or permitting contributions, for the benefit of an employee covered by the award who is a default fund employee, to be made to a superannuation fund or scheme specified in the modern award" unless the fund either offers a MySuper product or is an exempt public sector superannuation scheme. Proposal A would satisfy this requirement because the funds specified in each Common Award would not be disturbed.

2.15. Accordingly, Proposal A would satisfy the statutory requirements imposed on superannuation clauses.

Clauses in the Common Awards

2.16. The superannuation clauses in the seven Common Awards are largely identical. They all include what was described in the *Modern awards superannuation clauses review* (AM2022/29) as a "long standard clause with absence from work provision" (category 2 clauses).[28]

2.17. One obvious point of difference between the clauses in each award is the specified default funds. Proposal A does not involve any suggestion that the default funds specified in each award should be varied in any manner.

2.18. The second (and only noticeable other) difference between the superannuation clauses in the Common Awards relates to the absence from work provisions. These clauses slightly differ in the *Hospitality Industry (General) Award 2020* and *Restaurant Industry Award 2020* in comparison with other awards with similar superannuation clauses, including all the other Common Awards. The obligation in relation to absences for work-related injuries or illnesses only applies where the employee is "entitled to accident pay" for the period.

2.19. That difference is illustrated in the below table. The clause in the *Restaurant Industry Award 2020* is the same as that in the right column apart from having different numbering.[29]

[26] See ibid.
[27] Ibid s 149A(2) (repealed by *Fair Work Amendment Act 2012* (Cth)).
[28] Background Document 3—award superannuation clauses by category', *Modern award superannuation clause review*, AM2022/29, 28 September 2022, 2.
[29] *Restaurant Industry Award 2020* cl 22.5.

Clerks – Private Sector Award 2020 Clause	*Hospitality Industry (General) Award 2020* Clause
20.5 Absence from work Subject to the governing rules of the relevant superannuation fund, the employer must also make the superannuation contributions provided for in clause 20.2 and pay the amount authorised under clauses 20.3(a) or 20.3(b): (a) Paid leave—while the employee is on any paid leave. (b) Work-related injury or illness—For the period of absence from work (subject to a maximum of 52 weeks) of the employee due to work-related injury or work-related illness provided that: (i) the employee is receiving workers compensation payments or is receiving regular payments directly from the employer in accordance with the statutory requirements; and (ii) the employee remains employed by the employer.	**27.5 Absence from work** Subject to the governing rules of the relevant superannuation fund, the employer must also make the superannuation contributions provided for in clause 27.2 and pay the amount authorised under clauses 27.3(a) or 27.3(b): (a) Paid leave —while the employee is on any paid leave; (b) Work-related injury or illness —**in respect of any employee entitled to accident pay** for the period of absence from work of the employee due to work-related injury or work-related illness provided that: (i) the employee is receiving workers compensation payments or is receiving regular payments directly from the employer in accordance with the statutory requirements; and (ii) the employee remains employed by the employer.

2.20. In summary, the clauses in each Common Award are, for the most part, identical and therefore present the same problems which would be addressed by Proposal A.

Problems with the Clauses

Length

2.21. The superannuation clauses in each Common Award are unnecessarily long. They each lengthen the awards by over 450 words. This detracts from usability.

Superannuation Legislation

2.22. The award clauses do not need to specify each superannuation statute applicable to an employer's superannuation obligations. As discussed above, the purpose of modern awards is not to be general guidance documents.

2.23. Employers do not and should not rely on superannuation clauses in modern awards to understand their superannuation obligations. The adoption of a view that these clauses should be relied on for such purposes would necessitate a variation to every superannuation clause to drastically lengthen them, specifying the vast array of other rules and requirements that apply to employers' superannuation obligations.

2.24. In fact, the necessarily limited explanation of employers' superannuation obligations risks misleading employers into believing that the award clauses are a comprehensive statement of these matters. This detracts from the usability of awards by causing potential confusion and legal exposure.

2.25. The entire clause specifying the statutes should be removed because the final two sentences are now also inconsistent with the stapling of fund requirements.

2.26. Instead, the clause should merely refer employers to superannuation legislation and the existence of the new NES entitlement.

Employer Contributions

2.27. The current clause X.2 in the Common Awards provides:

> **20.2 Employer contributions**
>
> An employer must make such superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee.

2.28. As of 1 January 2024, this clause will unnecessarily duplicate the NES. This is because of the new section 116B that will be inserted into the FW Act:

> **116B Employer's obligation to make superannuation contributions**
>
> An employer must make contributions to a superannuation fund for the benefit of an employee so as to avoid liability to pay superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* in relation to the employee.[30]

2.29. During the award modernisation process, the Australian Industrial Relations Commission explicitly rejected "suggestions that the terms of the NES should be included in the awards" and held that there was an obligation to not "simply repeat the terms of the NES in modern awards".[31] Throughout the 4 yearly review process, the FWC continued the "approach of including a reference to the NES instead of reproducing NES entitlements in modern awards".[32]

[30] See *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* (Cth).
[31] *Re Minister for Employment and Workplace Relations* [2008] AIRCFB 1000 [34].
[32] *Re 4 yearly review of modern awards* [2019] FWCFB 5144 [7].

2.30. Consistent with this approach, the duplication of the new NES entitlement should be addressed by removing the obligation from all modern awards and instead inserting a reference to the new provision.

Voluntary Employee Contributions

2.31. The current clause X.3 in the Common Awards purports to allow an employee to authorise an employer to deduct from their post-taxation wages amounts to be deposited into their superannuation fund.

2.32. However, employees are already entitled to enter salary sacrifice arrangements for superannuation contributions under section 324 of the FW Act. For example, the dispute in *Casey Grammar School v Independent Education Union of Australia* [2010] FWA 8218 concerned such an arrangement.

2.33. As a result, this clause appears superfluous. It unnecessary lengthens and complicates modern awards and includes requirements that can be ignored by instead relying on the provisions in the FW Act.

Superannuation Fund

2.34. The clause X.4 in the Common Awards that specifies default funds was subject to submissions by ACCI in the *Modern awards superannuation clauses review* (AM2022/29). The clause currently conflicts with superannuation law following legislative change.

2.35. The proposed redrafting largely mirrors our submissions made in those proceedings. It would relieve the clause of its inconsistency with superannuation law by deleting the words "that is chosen by the employee" in recognition of the new stapling of fund requirements. It would also add the words "provided that, in respect of new employees, the fund is able to accept new beneficiaries" to alert parties to the potential inability for default funds specified in the award to accept new beneficiaries. The phrase "in respect of new employees" would ensure that employers are not prohibited from continuing to make superannuation contributions for the benefit of an employee to a default fund of which they are already a beneficiary in circumstances in which the fund becomes unable to accept new beneficiaries, consistent with superannuation law.

2.36. It differs from the proposed redrafting submitted in those proceedings (which sought to address narrower issues, rather than specifically enhance the usability of the clauses) by making the following further changes:

> **X.4 Superannuation fund**
>
> Unless, to comply with superannuation legislation, the employer is required to make the superannuation contributions provided for in clause X.2 to another superannuation fund (for example, a stapled fund), the employer must satisfy the NES requirements by making contributions ~~make the superannuation contributions provided for in clause X.2 and pay the amount authorised under clauses X.3(a) or X.3(b)~~ to one of the

following superannuation funds or its successor, provided that, in respect of new employees, the fund is able to accept new beneficiaries:

(a) [Default Fund A]

(b) [Default Fund B]

…

2.37. These changes improve its usability by offering an example of when the employer is required to make the superannuation contributions provided for in clause X.2 to another superannuation fund and tying the clause back to the new NES entitlement.

Absence from Work

2.38. Proposal A would remove the requirement under the award to make superannuation contributions for the benefit of an employee who is absent from work on a period of paid leave. This is because payments made to an employee on leave (eg, personal/carer's leave and annual leave) still generally constitute ordinary time earnings which attract superannuation obligations.[33]

Modern Awards Objective

2.39. Proposal A would address "the need to ensure a simple, easy to understand, stable and sustainable modern award system".[34] It would do so by simplifying existing award clauses, thereby making them easier to understand. It would also improve the stability of the award system by reducing the likelihood that future legislative changes to superannuation law require a revisitation of superannuation clauses.

Review Condition

2.40. Proposal A would not result in a reduction in worker entitlements. It would remove the obligation on employers to make superannuation contributions for their benefit from the award, however, as noted, this is because the entitlement will be retained through its insertion into the NES. The aspects of the current clauses that would be removed, the ability to enter salary sacrifice arrangements and entitlement to superannuation contributions in respect of leave payments, are similarly already available to employees in the absence of the award provisions.

[33] See Australian Tax Office, *Superannuation Guarantee Ruling 2009/2*.
[34] *Fair Work Act 2009* (Cth) s 134(1)(g).

3 Time Off In Lieu Clauses

Proposal B

3.1. The time off in lieu (**TOIL**) clauses in the *Clerks – Private Sector Award 2020*, *Children's Services Award 2010*, *Hospitality Industry (General) Award 2020*, and *Social, Community, Home Care and Disability Services Industry Award 2010* should be replaced with a new clause that appears as follows:

X.X Time off instead of payment for overtime

(a) An employer and employee may agree in writing to the employee taking an equivalent amount of time off instead of being paid for a particular amount of overtime worked by the employee, provided that no undue influence or undue pressure is exerted on either party.

(b) The time off must be taken at a time or times agreed by the employer and employee.

(c) The employer must pay the employee as soon as practicable for any overtime hours that were subject to an agreement under subclause (a) and have not been taken off where:

(i) the employee decides to cancel the agreement;

(ii) the employee does not take the agreed time off within 12 months of the overtime hours being worked; or

(iii) the employment is terminated.

3.2. For the *Clerks – Private Sector Award 2020*, the new clause specified above should replace clause 23. The award should be further varied by replacing clause 29 with the following clause:

29 Time off instead of payment for overtime (shiftworkers)

Clause 23 also applies to shiftworkers.

3.3. The TOIL clauses in the *Fast Food Industry Award 2020*, *General Retail Industry Award 2020*, and *Restaurant Industry Award 2020* should be replaced with a new clause that appears as follows:

X.X Time off instead of payment for overtime

(a) An employer and employee may, without undue influence or pressure, freely agree in writing to the employee taking time off instead of being paid for a particular amount of overtime.

(b) The period of time off that an employee is entitled to take is equivalent to the overtime payment that would have been made.

EXAMPLE: By making an agreement under clause X.X, an employee who worked 2 overtime hours at the rate of 150% is entitled to 3 hours' time off.

(c) The employer must pay the employee as soon as practicable for any overtime hours that were subject to an agreement under subclause (a) and have not been taken off where:

(i) the employee decides to cancel the agreement;

(ii) the employee does not take the agreed time off within 6 months of the hours being worked; or

(iii) the employment is terminated.

Submissions

3.4. Proposal B should be adopted for the following reasons.

Problems in Current Clauses

3.5. In *Re 4 yearly review of modern awards* [2015] FWCFB 4466 (**July 2015 Award Flexibility Decision**), the Full Bench considered a claim to insert a model TOIL clause in many awards.[35] The claim proposed a clause that contained only five, relatively simple, subclauses.[36]

3.6. After dealing with some jurisdictional matters in relation to the proposed clause,[37] the Commission proceeded to accept the merits of the claim and conclude that a model TOIL clause should be adopted in some awards;[38] however, the Commission did not accept the content of the proposed model TOIL clause.[39] Instead, the Commission expressed a provisional view proposing its own model TOIL clause. This new model clause was more than double the length (and 343 words longer) than that which was advanced in the initial claim.[40]

3.7. Three months later, in *Re 4 yearly review of modern awards* [2015] FWCFB 6847, the Commission varied the proposed model TOIL clause following receipt of submissions in response to its provisional views previously expressed. This variation somewhat simplified the proposed term.[41]

3.8. The model term was then subject to further consideration in *Re 4 yearly review of modern awards* [2016] FWCFB 2602 and a final version was adopted in *Re 4 yearly review of modern awards* [2016] FWCFB 4258.

3.9. The consequence of these decisions is that TOIL clauses have been adopted in modern awards which are long, complex and difficult to use. Someone without expertise in workplace relations cannot easily understand the effect of the provisions.

3.10. For instance, the clauses currently scatter the circumstances that may require an employer to pay an employee for overtime hours that were worked and subject to a TOIL agreement. Paragraphs (f) and (g) (or clauses 23.6 and 23.7 in the *Clerks – Private Sector Award 2020*) identify two of such circumstances, namely where an employee requests payment or the time off is not taken within six months. It is not until

[35] *Re 4 yearly review of modern awards [2015] FWCFB 4466* [43].
[36] Ibid [43]-[44].
[37] Ibid [95]-[144].
[38] Ibid [256].
[39] See ibid.
[40] Cf ibid [43]-[44]; ibid [256].
[41] *Re 4 yearly review of modern awards* [2015] FWCFB 6847 [68].

four paragraphs later, in paragraph (k), where the clause notes that the termination of employment is a further scenario in which the employer must pay the employee for time that was subject to a TOIL agreement. If an employer, having made a TOIL agreement with an employee were to examine the clauses to identify in what circumstances they would instead have to pay their employee for the overtime hours that were worked, they would face some difficulty.

3.11. The TOIL clauses also overregulate these agreements. The clauses overprescribe the content of the written agreements allowing an employee to take TOIL. The model term presently requires:

> **(c)** An agreement must state all of the following:
>
> (i) the number of overtime hours to which it applies and when those hours were worked; and
>
> (ii) that the employer and employee agree that the employee may take time off instead of being paid for the overtime; and
>
> (iii) that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked; and
>
> (iv) that any payment mentioned in clause X.3(c) must be made in the next pay period following the request.

3.12. In the July 2015 Award Flexibility Decision, these prescriptions were described as "safeguards which will provide clear rules about the taking and recording of TOIL".[42] However, it is unclear what harm they protect employees from. These requirements merely increase the administration involved in the making of TOIL agreements. .

Merits of Proposal

3.13. Proposal B would address the above issues. It would drastically reduce the administrative burden involved, improve the readability of the clauses, shorten them, and thereby make them easier to use.

3.14. The proposed clause would dispense with the prescriptive requirements for the content of TOIL agreements. The parties must still freely agree *in writing* to entering into a TOIL arrangement; inevitably, many of the prescribed requirements will therefore be incorporated into this written agreement, however, breaches of awards will not arise where an employer fails to state in the agreement "that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked" ((iii)).

3.15. The proposed clause would also clearly state for parties the three circumstances in which an employer must pay the employee for time that was subject to the TOIL agreement.

[42] *Re 4 yearly review of modern awards* [2015] FWCFB 4466 [267].

3.16. Proposal B does not seek to disturb the time-for-time and time-for-penalty distinctions between different awards. These should be preserved.

3.17. Proposal B seeks to make one other key change to the TOIL clauses: the increase in the period in which the TOIL must be taken from 6 months to 12 months. This is based on feedback from our members that employees are increasingly asking employers to allow them to accumulate larger amounts of TOIL to use for future absences. The current period of 6 months is unnecessarily restrictive and should be expanded.

Modern Awards Objective

3.18. Proposal B would address "the need to ensure a simple, easy to understand, stable and sustainable modern award system".[43] It would do so by simplifying TOIL clauses and making them easier to understand for employers.

3.19. Proposal B is likely to "promote flexible modern work practices".[44] In the July 2015 Award Flexibility Decision, the Full Bench accepted "the proposition that inserting a TOIL provision into a modern award which provides for overtime but does not presently contain a facilitative provision permitting TOIL, is consistent with the promotion of flexible modern work practices."[45] Of course, the insertion of TOIL provisions alone will not promote flexible work practices; they must be usable and accessible. Proposal B would improve the usability and accessibility of these provisions and thereby further promote flexible work practices.

3.20. Proposal B is also likely to "promote social inclusion through increased workforce participation".[46] As the Full Bench accepted in the July 2015 Award Flexibility Decision, "flexible working arrangements, such as TOIL, may encourage greater workforce participation, particularly by workers with caring responsibilities."[47] Proposal B may further encourage workforce participation by making TOIL arrangements easier to use.

3.21. Proposal B will likely minimise the adverse "impact of any exercise of modern award powers on business" particularly in relation to "the regulatory burden".[48] In the July 2015 Award Flexibility Decision, the Full Bench accepted that "the flexibility provided by a TOIL term may be said to reduce regulatory burden";[49] however, Proposal B goes further. Not only does Proposal B make the TOIL provisions more usable and thereby reduce the regulatory burden that applies where such arrangements cannot be entered into, but Proposal B reduces the regulatory burden imposed on TOIL arrangements themselves.

[43] *Fair Work Act 2009* (Cth) s 134(1)(g).
[44] Ibid s 134(1)(d).
[45] *Re 4 yearly review of modern awards* [2015] FWCFB 4466 [238].
[46] *Fair Work Act 2009* (Cth) s 134(1)(c).
[47] *Re 4 yearly review of modern awards* [2015] FWCFB 4466 [236].
[48] *Fair Work Act 2009* (Cth) s 134(1)(f).
[49] *Re 4 yearly review of modern awards* [2015] FWCFB 4466 [242].

Review Condition

3.22. Proposal B would not result in a reduction in worker entitlements. The requirements that presently apply to written TOIL agreements are procedural obligations imposed on the employer; they do not entitle an employee to a particular right or working arrangement.

4 Annualised Wage Arrangement Clauses

Proposal C

4.1. The annualised wage arrangement clauses in the *Clerks—Private Sector Award 2020*, the *Hospitality Industry (General) Award 2020* and the *Restaurant Industry Award 2020* (i.e. the Common Awards with such clauses) should be replaced with the following new clause:

X. Annualised wage arrangements

X.1 Annualised wage instead of award provisions

(a) An employer may pay a full time employee an annualised wage in satisfaction of any or all of the following provisions of the award:

[specified clauses]

(b) Where an annualised wage is paid, the employer must advise the employee in writing, and keep a record of:

(i) the annualised wage that is payable; and

(ii) which of the provisions of this award will be satisfied by payment of the annualised wage.

X.2 Annualised wage not to disadvantage employees

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or, if the employment ceases earlier, over such lesser period as has been worked).

(b) At least once per year, the employer must review the annualised wage of the employee to ensure that the compensation is no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid.

X.3 Base rate of pay for employees on annualised wage arrangements

For the purposes of the NES , the base rate of pay of an employee receiving an annualised wage under clause X comprises the portion of the annualised wage equivalent to the relevant rate of pay in clause X — Minimum rates and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

4.2. The same clauses in the awards that the existing annualised wage arrangement clauses specify can be satisfied by the payment of an annualised salary should be replicated in the new clauses at clause X.1(a).

4.3. Proposal C is based on variations to the existing clause in the *Clerks—Private Sector Award 2020*. A marked-up version of that clause is as follows:

18. Annualised wage arrangements

18.1 Annualised wage instead of award provisions

(a) An employer may pay a full time employee an annualised wage in satisfaction~~, subject to clause 18.1(c),~~ of any or all of the following provisions of the award:

…

(b) Where an annualised wage is paid, the employer must advise the employee in writing, and keep a record of:

(i) the annualised wage that is payable; and

(ii) which of the provisions of this award will be satisfied by payment of the annualised wage~~;~~.

~~(iii) the method by which the annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and~~

~~(iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause 18.1(c) .~~

~~(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified pursuant to clause 18.1(b)(iv) , such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.~~

18.2 Annualised wage not to disadvantage employees

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or, if the employment ceases earlier, over such lesser period as has been worked).

(b) At least once per year, the employer must review the annualised wage of the employee to ensure that the compensation is no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid.

~~(c) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or, if the employment ceases earlier, over such lesser period as has been worked).~~

~~(d) The employer must each 12 months from the commencement of the annualised wage arrangement or upon the termination of employment of the employee calculate the amount of remuneration that would have been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 14 days.~~

~~(e) The employer must keep a record of the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause 18.2(b) . This record must be signed by the~~

~~employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.~~

X.3 Base rate of pay for employees on annualised wage arrangements

For the purposes of the NES , the base rate of pay of an employee receiving an annualised wage under clause 18 comprises the portion of the annualised wage equivalent to the relevant rate of pay in clause 16 — Minimum rates and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

Submissions

4.4. Proposal C should be adopted for the following reasons.

Existing Clauses

4.5. As indicated, among the Common Awards, only the *Clerks—Private Sector Award 2020*, the *Hospitality Industry (General) Award 2020* and the *Restaurant Industry Award 2020* include an annualised wage arrangement clause. At this stage, ACCI does not propose to vary the other Common Awards, the *Children's Services Award 2010*, *Fast Food Industry Award 2020*, *General Retail Industry Award 2020* or the *Social, Community, Home Care and Disability Services Industry Award 2010*, to insert an annualised wage arrangement clause. This is because we have not received a finalised view from organisations in these industries as to whether this would desirable, and consultation remains ongoing. However, were employer associations that represent employers covered by these awards to express a desire for such a variation, we would be inclined to support.

4.6. The annualised wage arrangement clauses in the *Hospitality Industry (General) Award 2020* and the *Restaurant Industry Award 2020* are largely similar. The clauses in the *Clerks—Private Sector Award 2020* differ from the other two awards.

4.7. The most significant difference between these clauses is that the former two awards require an annualised salary arrangement to only be entered into by agreement between the employer and employee. This means that the clauses naturally also include processes for the termination of the agreement. The clause in the *Clerks—Private Sector Award 2020*, by contrast, allows the employer to unilaterally decide to pay an employee under an annualised salary arrangement.

Annualised Wages

4.8. The Full Bench has previously identified the important benefits provided by an annualised wage arrangement to an employer, namely that the arrangement:[50]

[50] *Re Annualised Wage Arrangements* [2018] FWCFB 154 [101].

- "allows the remuneration of the employee to be set at a fixed amount for each pay period notwithstanding that the employee works varying hours";
- "may confer business advantages in terms of managing cash flow and creating predictability in labour costs";
- "will be administratively simpler for employers in that it will not require a separate calculation of wages owing to be made in each pay period";
- "may potentially mean that the employer is not required to keep precise records of hours worked by employees"; and
- "may also have the advantage of removing any incentive upon employees to 'drag out' the performance of their work and thereby earn overtime".

4.9. The Full Bench also noted the benefits for the employee, namely that:

- they will "receive a fixed and certain remuneration amount each pay period regardless of the number of hours worked"; and
- they will obtain "the advantages of income security and predictability of earnings for the purpose of budgeting and obtaining finance".

4.10. Unfortunately, following the Full Bench's review of annualised wage arrangement clauses, they remain difficult to use. This can be attributabed to the considerable administrative burden involved. Proposal C would relieve these clauses in the Common Awards of this administrative burden.

4.11. Feedback from ACCI members is that annualised wage arrangement clauses are rarely used. This is attributed to the complexity of the provision.

4.12. Instead, the vast majority of employers using annualised wage arrangements do so through common law set-off clauses in contracts pursuant to the rule in *Poletti v Ecob (No 2)* (1989) 31 IR 321 that was affirmed in *Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate* [2015] FCAFC 99.

4.13. This poses a problem for employers, evidenced by recent comments by the Full Bench that the common law set-off approach "is not entirely free from legal difficulty".[51]

4.14. First, there is often uncertainty under the common law set-off approach as to whether the above-award component of the employee's wages sufficiently compensates the employee for the award entitlements. The complexity of the annualised wage arrangement clauses in modern awards exposes employers to potential noncompliance and liability, and continues to encourage employers to adopt the common-law approach, despite the difficulties and risk associated with it.

[51] Ibid [102].

4.15. Second, as the Full Bench previously identified:

> the fact that an annual salary provided for in a contract of employment may, over the course of a year, equal or exceed identified award entitlements such as to discharge payment of them may, arguably, not amount to compliance with an award requirement that pay entitlements are required to be made to the employee within a specified pay period.[52]

4.16. Third, the present impracticability of using the annualised wage arrangement clauses in modern awards prejudices smaller businesses. This is because these businesses will often be unable to compensate their employees sufficiently above the award to confidently rely on the common law set-off approach. The closer that a business pays to the minimum rates in awards, the more risk associated with the common law set-off approach.

4.17. The perverse consequence of this is that smaller businesses, with less capacity for managing regulatory compliance, are subjected to more onerous workplace obligations. Whereas larger businesses can use the common law set-off approach to avoid the complexities of aspects of award such as overtime rates and allowances, smaller businesses are afforded no opportunity to do the same, despite being less resourced.

4.18. As held by the Full Bench:

> Issues such as these may make the payment of a salary pursuant to an annualised wages provision in a modern award a more desirable and legally certain option.[53]

Problems in Current Clauses

4.19. Proposal C seeks to remove several aspects of the existing clauses that are administratively burdensome.

4.20. These clauses that would be removed are designed to facilitate the guarantee that an employee is compensated no less than the amount the employee would have otherwise received if no annualised wage arrangement is in place. They are not constitutive of substantive worker entitlements in themselves.

4.21. However, these requirements are not necessary. The clause should be designed with minimum prescription and allow parties to facilitate this guarantee in the manner most relevant to their particular circumstances. If a dispute arises as to whether the compensation is sufficient, the dispute resolution clauses can be relied on to resolve it.

4.22. Additionally, as noted, the annualised wage arrangement clauses in the *Hospitality Industry (General) Award 2020* and the *Restaurant Industry Award 2020* require the parties to enter into written agreements before an annualised wage is paid. In our submission, this requirement is neither necessary nor appropriate.

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[52] *Re Annualised Wage Arrangements* [2018] FWCFB 154 [102].
[53] See ibid.

4.23. Fundamentally, the method of wage payment is a decision that falls within the managerial prerogative of an employer. If the employee is being compensated pursuant to the entitlements they are owed under the relevant industrial instrument and their employment contract, the specific means of doing so should not require their consent.

4.24. While an approach taken by employers that considers the needs and views of their employees is always preferable, it does not need to be mandated by modern awards. Doing so increases the complexity and administrative burden involved in engaging in such an arrangement.

4.25. It is appropriate for the new clause to mirror the clause in the *Clerks—Private Sector Award 2020* by allowing the employer to pay an annualised wage without mandating the agreement of the employee.

Statutory Requirements

4.26. The source of the Commission's power to include an annualised wage arrangement clause in a modern award lies in section 139(1). That provision provides:

> **Terms that may be included in modern awards—general**
>
> (1) A modern award may include terms about any of the following matters:
>
> …
>
> (f) annualised wage arrangements that:
>
> (i) have regard to the patterns of work in an occupation, industry or enterprise; and
>
> (ii) provide an alternative to the separate payment of wages and other monetary entitlements; and
>
> (iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;

4.27. Sub-paragraph (iii) requires that employees cannot be disadvantaged under an annualised wage arrangement.

4.28. The Full Bench, when summarising the requirement in section 139(1)(f)(iii), held that:

> Therefore, in summary, a permissible annualised wages term must guarantee that, over the course of a year, an employee does not receive any less remuneration under the arrangement than would otherwise be payable under the provisions of the award.[54]

4.29. Proposal C provides this guarantee. It primarily does so by preserving the requirement in clause X.2(a) that:

[54] *Re Annualised Wage Arrangements* [2018] FWCFB 154 [105].

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or, if the employment ceases earlier, over such lesser period as has been worked).

4.30. The employer would still be required to conduct an annual review of the adequacy of the annualised wage arrangement (clause X.2(b)) and would be bound by record requirements (clause X.1(b)).

4.31. Taken together, these provisions constitute sufficiently "appropriate safeguards".

Modern Awards Objective

4.32. Proposal C would address "the need to ensure a simple, easy to understand, stable and sustainable modern award system".[55] It would do so by simplifying the annualised wage arrangement clauses and making them easier to understand for employers.

4.33. Proposal C would also "promote flexible modern work practices".[56] The Full Bench reached the same conclusion in *Re South East Water Corporation* [2014] FWCFB 5195 in respect of introducing annualised salary arrangements into modern awards.[57] As Proposal C would make annualised salary arrangements much easier to use and accessible for smaller businesses, the promotion of flexible modern work practices by these clauses would be enhanced.

4.34. Proposal C would address "the needs of the low paid".[58] This is because employees who are paid close to the minimum award rates are generally deprived of the benefits of annualised wage arrangements. The existing clauses cannot provide these benefits because they are too difficult to use for employers. The common law set-off approach cannot provide these benefits because, by virtue of being low paid, their employers cannot pay them at a rate that sufficiently exceeds the award minimum rates to rely on this method.

4.35. Proposal C would address the new consideration of "the need to improve access to secure work across the economy".[59] In the *Annual Wage Review 2022-23* [2023] FWCFB 3500, the Expert Panel held:

> In the award context, job security is a concept which is usually regarded as relevant to award terms which promote regularity and predictability in hours of work and income and restrict the capacity of employers to terminate employment at will.[60]

4.36. As noted above, the Full Bench held in *Re Annualised Wage Arrangements* [2018] FWCFB 154 in relation to annualised wage arrangements that:

[55] *Fair Work Act 2009* (Cth) s 134(1)(g).
[56] Ibid s 134(1)(d).
[57] *Re South East Water Corporation* [2014] FWCFB 5195 [36].
[58] *Fair Work Act 2009* (Cth) s 134(1)(a).
[59] *Fair Work Act 2009* (Cth) s 134(1)(aa).
[60] *Annual Wage Review 2022-23* [2023] FWCFB 3500 [28].

> For the employee, there are benefits also: the employee will receive a fixed and certain remuneration amount each pay period regardless of the number of hours worked, which will carry with it the advantages of income security and predictability of earnings for the purpose of budgeting and obtaining finance.[61]

4.37. It is clear, therefore, that "the advantages of income security and predictability of earnings" arising from annualised wage arrangements accord with the promotion of regularity and predictability in income that the Full Bench has held to be entailed in the concept of job security. Making annualised wage arrangements more usable for employers and accessible to employees will therefore contribute to the pursuit of this consideration.

4.38. Moreover, the Expert Panel held in the *Annual Wage Review 2022-23* [2023] FWCFB 3500 that "the payment of weekly or monthly rather than hourly wages" is likely to be "most pertinent" to the promotion of secure work in the award context.[62] Annualised salary arrangements directly enable these payment methods. This further supports the need to make annualised salary arrangements easier to use for employers, as Proposal C would achieve.

4.39. Finally, Proposal C would minimise the adverse "impact of any exercise of modern award powers on business" particularly in relation to "the regulatory burden".[63] It would do so by deregulating the use of annualised wage arrangements.

Review Condition

4.40. Proposal C would not result in a reduction in worker entitlements. The requirements that presently apply to annualised wage arrangement records, such as the inclusion of details pertaining to the method of calculation and outer limits of hours, are procedural obligations imposed on the employer; they do not provide an employee with any entitlement. The same applies to the record keeping requirements.

[61] *Re Annualised Wage Arrangements* [2018] FWCFB 154 [101].
[62] *Annual Wage Review 2022-23* [2023] FWCFB 3500 [28].
[63] *Fair Work Act 2009* (Cth) s 134(1)(f).

5 Excessive Annual Leave Accrual Clauses

Proposal D

5.1. The clauses in each of the Common Awards relating to excessive annual leave accruals should be replaced with the following clause:

> **X.X Excessive leave accruals**
>
> Despite anything else in this clause, an employer may direct an employee to take a period of paid annual leave if:
>
> (a) the employer has genuinely tried to reach agreement with the employee on how to reduce their annual leave accrual;
>
> (b) the employee has accrued at least 8 weeks of annual leave (or 10 weeks' paid annual leave for a shiftworker);
>
> (c) the employer gives the employee no less than 8 weeks' notice to take the annual leave; and
>
> (d) the employee retains at least 6 weeks of accrued annual leave after the direction is given by the employer.

5.2. The *Fast Food Industry Award 2020* does not have provisions applying to "shiftworkers" and thus the words "(or 10 weeks' paid annual leave for a shiftworker)" in subclause (b) should be omitted in the clause in that award.

Submissions

5.3. Proposal D should be adopted for the following reasons.

Problems with Existing Clauses

5.4. The clauses that currently appear in modern awards of considerable length. They currently occupy nearly 800 words in each award. This detracts from the usability of both the clauses themselves and the award more broadly.

5.5. The clauses are complex despite pertaining to a relatively simple process. This complexity further detracts from the usability of awards and should be remedied.

Statutory Requirements

5.6. Section 93(3) provides:

> (3) A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.

5.7. Evidently, the crucial constraint imposed on excessive leave accrual terms is that the requirement to take annual leave must be "reasonable".

5.8. In our submission, Proposal D satisfies this requirement because of its maintenance of the existing thresholds that allow the direction to be made (subclauses (b)-(d)) and the requirement for genuine agreement to first be sought with the affected employee (subclause (a)).

Prior Claim

5.9. As many parties will be aware, Proposal D closely resembles a claim advanced by ACCI for an excessive leave accrual term during the 4 yearly review of modern awards. In 2015, ACCI proposed the insertion of such a term in the following form:

> **Excessive Annual Leave**
>
> Despite anything else in this clause, an employer may direct an employee to take paid annual leave if:
>
> (a) the employee has accrued at least six (6) weeks of annual leave;
>
> (b) the employer gives the employee four (4) weeks' notice to take the annual leave; and
>
> (c) the employee retains at least four (4) weeks of accrued annual leave after the period of leave is taken.[64]

5.10. There are two key differences in Proposal D with this prior claim that justify its consideration.

5.11. First, Proposal D retains the requirement for an employer first genuinely try to reach agreement with the employee on how to reduce their annual leave accrual before directing them to take a period of leave. This aspect did not appear in the prior claim and further supports the reasonableness of a requirement to take leave issued under the clause, in accordance with section 93(3).

5.12. Second, Proposal D would involve the thresholds of accrual, notice, and retained accrual that currently appear in the relevant clauses. This also further supports the reasonableness of a requirement to take leave.

5.13. These differences largely abate or exclude the concerns expressed by the Full Bench with ACCI's prior claim. The Full Bench made "[t]wo general observations … about the model term sought".[65]

5.14. The first observation was that the "adoption of a threshold of six weeks' accrued annual leave" was not considered appropriate. This concern is not relevant to Proposal D because a different threshold (one that the Full Bench *has* considered appropriate) has been adopted.

5.15. The Full Bench further stated:

[64] *Re 4 yearly review of modern awards* [2015] FWCFB 3406 [59].
[65] Ibid [171].

> We also observe that the Employer Group's model term does not require an employer to enter into any dialogue with an employee before directing them to take part of their annual leave. In particular, the employer is under no obligation to discuss the issue of excessive annual leave accrual with the employee or to seek to reach an agreement with the employee about the time for taking such leave. It is plainly preferable if these matters can be resolved by agreement between the employer and employee, without the need for a direction.[66]

5.16. By contrast, Proposal D would require an employer to enter any dialogue with an employee before directing them to take part of their annual leave. This concern is therefore also irrelevant.

5.17. The second observation made by the Full Bench was that:

> **[183]** The Employer Group's claim, understandably enough, provided a mechanism to address employer concerns about the accumulation of leave — that is, it provides a means of reducing a significant financial liability.
>
> **[184]** But the Employer Group's model term provided no avenue for an employee to exercise any control over the time at which their leave is to be taken.
>
> **[185]** In this context it is important to observe that the Employer Group's claim simply sought to replicate (in form if not substance) previous legislative and award mechanisms to address excessive annual leave accruals. As we have mentioned, before the Work Choices Act amendments, some state and territory annual leave laws provided employers with a right to direct employees to take their annual leave. Further, some 79 modern awards also contain "excessive leave" provisions.
>
> **[186]** But, importantly, experience has shown that providing employers with a right to direct employees to take their annual leave has not provided a complete solution to the issue of excessive annual leave accruals.[67]

5.18. This second observation led the Full Bench to redraft the proposed model term to include a right for employees to request a period of annual leave to be taken where certain thresholds are met but the employer has not issued any such direction.[68]

5.19. In our submission, this employee right is of little utility at the cost of significant length and complexity.

5.20. Employees are already entitled under the NES to take annual leave they have accrued.[69] Hence, removing this right from awards does not result in any reduction in worker entitlements.

5.21. Employers are, of course, entitled to refuse a request by an employee to take annual leave if the refusal is reasonable.[70] The current award right clearly constrains the ability for an employer to refuse such requests in circumstances where the relevant thresholds have been met.

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[66] Ibid [177].
[67] Ibid [183]-[186].
[68] Ibid [189].
[69] *Fair Work Act 2009* (Cth) s 88(1).
[70] Ibid s 88(2).

5.22. This constraint on employers' right of refusal is not necessary. The protection afforded by the NES is adequate. The constraining right increases the complexity and length of the award provisions. Moreover, it makes modern awards more difficult to use for employers by curtailing their ability to refuse the taking of annual leave on reasonable bases. It should be removed.

5.23. One other difference between the proposed clause and the existing clauses is worth addressing. Presently, the relevant clauses prohibit an employer from requiring an employee to take a period of annual leave "more than 12 months" after the direction is given. This requirement does not appear necessary and disadvantages both the employer and the employee. From the employer's perspective, it constrains their managerial decision-making. From the employee's perspective, it means that an employer who intends on requiring an employee to take a period of annual leave at a time more than 12 months away will be forced to give them less notice than they otherwise would have. A longer notice period is clearly of benefit to the employee.

Modern Awards Objective

5.24. Proposal D would address "the need to ensure a simple, easy to understand, stable and sustainable modern award system".[71] It would do so by drastically reducing the length and complexity that presently pervades the excessive annual leave accrual provisions. The proposed clause is far more "simple" and "easy to understand" than the existing provisions.[72]

5.25. Proposal D would also substantially reduce "the regulatory burden" involved in excess annual leave directions and thereby improve "the likely impact of any exercise of modern award powers on business".[73]

Review Condition

5.26. Proposal D would not result in a reduction in worker entitlements. The extensive requirements applying to directions to take annual leave which would be repealed are procedural in nature; they prescribe preconditions to the exercise of an employer's power but do not confer an entitlement on an employee. The removal of the right of an employee to take excessive annual leave that has been accrued does not constitute a reduction in worker entitlements because an employee retains their entitlement to do so under the NES. In addition, the entitlement of an employee to be consulted and sought for genuine agreement prior to the exercise of this power would be retained.

[71] *Fair Work Act 2009* (Cth) s 134(1)(g).
[72] See ibid.
[73] Ibid s 134(1)(f).

6 Consultation Clauses

Proposal E

6.1. The consultation clauses (relating both to major workplace changes and roster changes) in each of the Common Awards should be replaced with the following clause:

X Consultation

X.1 This clause applies if the employer:

(a) makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees; or

(b) proposes to change the regular roster or ordinary hours of work of an employee, other than an employee whose working hours are irregular, sporadic or unpredictable.

X.2 In this clause, **significant effects** on employees include any of the following:

(a) termination of employment; or

(b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or

(c) loss of, or reduction in, job or promotion opportunities; or

(d) loss of, or reduction in, job tenure; or

(e) alteration of hours of work; or

(f) the need for employees to be retrained or transferred to other work or locations; or

(g) job restructuring.

X.3 As soon as practicable, the employer must:

(a) inform, in writing, the affected employees and their representatives (if any) of all reasonably relevant information about the changes, including:

(i) what the change is; and

(ii) how the change is likely to affect the employees ; and

(b) invite the affected employees and their representatives (if any) to discuss the change, its expected effect, and possible measures to minimise its adverse effects; and

(c) promptly consider any views expressed by the affected employees and their representatives (if any).

X.4 For the purposes of consultation about a change in the regular roster or ordinary hours of work of an employee, references to "employees" in clause X.3 include an individual employee.

Submissions

6.2. Proposal E should be adopted for the following reasons.

Problems with Existing Clauses

6.3. The length of the existing clauses detracts from the usability of awards. This is primarily a product of separating the consultation clauses applying to roster changes and major workplace changes into distinct clauses.

6.4. The feedback from our members is that these clauses are often redrafted in enterprise agreements with some degree of amalgamation. The benefits to usability of these changes could also be afforded to award-covered employers by adopting Proposal E.

6.5. The current separation of the two clauses not only lengthens the awards but also adds complexity by imposing different requirements on consultation depending on its object. These different requirements are not immediately clear from reading the clauses and thereby potentially expose employers to non-compliance because of assumptions that the requirements are the same.

6.6. Proposal E seeks to address these problems in the existing clauses. It does so while trying to minimise any disturbance to existing requirements relating to consultation. It would not result in any reduction in worker entitlements.

6.7. However, the redrafting of the clauses inevitably results in some differences, as outlined below. Nevertheless, these differences improve the usability of the award, do not reduce worker entitlements, and remain consistent with the modern awards objective.

Differences with Existing Clauses

6.8. First, the current clauses appear to require written notice of a major workplace change to be given in addition to written information about the change (current clause X.1(a)). This does not appear necessary because written information about the change itself *notifies* the affected employees (proposed clause X.3(a)).

6.9. Second, the current clauses require "all relevant information about the changes" to be given to employees except for "any confidential information if its disclosure would be contrary to the employer's interests" (current clauses X.2 and X.3). Proposal E simplifies this requirement by providing instead that the employee must provide employees with "all reasonably relevant information about the changes". This would ensure that employers are not required to disclose confidential information adverse to their interests because it would not be reasonable.

6.10. Additionally, the new wording provides employers with some degree of certainty around what information must be provided. The current requirement to provide "all relevant information" detracts from usability

because it is unclear what threshold of relevance compels an employer to provide such information. In some sense, *all* information about a change is to some degree "relevant"; however, clearly the clause does not purport to require the provision of *all* information about a change. Hence, the inclusion of the word "reasonably" improves the usability of the clause.

6.11. Third, Proposal E would mean that employers are only required to "invite" affected employees and their representatives to discuss a definite decision about a major workplace change (proposed clause X.3(b)) rather than "commence discussions as soon as practicable after a definite decision has been made" (current clause X.1(c)). This is a product of amalgamation because it would be excessively onerous to require employers to commence discussions with employees for every change in a regular roster, rather than merely invite them to discuss the change. Conversely, it would not appear to be a significant detraction in the safeguards applying to consultation about major workplace changes to only require an employer to "invite" rather than "commence" discussion about the change. If affected employees and their representatives are invited to discussions about the change, their lack of engagement should not impugn the employer's conduct.

6.12. The proposed amalgamation would *strengthen* worker entitlements to some degree by imposing the requirements presently applying only to consultation about major workplace changes on consultation about changes to roster and hours of work. For instance, under Proposal E, an employer would be required to "promptly consider" the views expressed by an employee or their representative, whereas they are currently only required to "consider" their views.

6.13. Accordingly, these differences are justifiable because they improve the usability of the clauses without reducing worker entitlements.

Modern Awards Objective

6.14. Proposal E would simplify consultation clauses and make them easier to use. This would help address "the need to ensure a simple, easy to understand, stable and sustainable modern award system".[74]

Review Condition

6.15. Proposal E would not result in a reduction in worker entitlements. The entitlement of employees to be consulted on major workplace changes and roster changes would be retained. Proposal E also does not involve any meaningful change to the procedural requirements applying to consultation.

[74] *Fair Work Act 2009* (Cth) s 134(1)(g).

7 Individual Flexibility Arrangement Clauses

Proposal F

7.1. The clauses relating to individual flexibility arrangements (**IFA**s) in each of the Common Awards should be amended to include the following additional clause:

> **X.5** An agreement must result in the employee being better off overall at the time the agreement is made than if the agreement had not been made.
>
> **X.6** For the purposes of clause X.5, an employee would be better off overall if the agreement:
>
> (a) does not disadvantage the employee overall; and
>
> (b) is preferred by the employee in comparison with the relevant award terms because it better meets their genuine needs.

7.2. The successive clauses should then be renumbered accordingly.

Submissions

7.3. Proposal F should be adopted for the following reasons.

Problems with Existing Clauses

7.4. IFA clauses serve a critical purpose. Given the diversity of workplaces, the terms of modern awards are not always suitable for every working arrangement. There must be a mechanism for allowing employers and employees to agree to arrangements that differ from the terms of an award, without leaving a worker worse off. IFAs are designed to provide such a mechanism. They benefit employers and employees who chose to enter into them.

7.5. Unfortunately, IFAs are rarely used. In the General Manager of the FWC's most recent report into the use of IFAs pursuant to section 653, of all respondents (comprising employers, unions, employer associations and legal practitioners) 64.9% had been involved in the making of or responding to 10 or fewer IFAs between 2018 and 2021.[75]

7.6. The feedback that ACCI persistently receives from employers and their representatives is that the low utilisation of IFAs is largely attributable to the administrative complexity and burden required by IFA clauses. In particular, it is unclear how the requirement for an employee to be better off overall under an IFA must be satisfied.

Statutory Requirements

[75] Murray Furlong, *General Manager's report into individual flexibility arrangements under section 653 of the Fair Work Act 2009 (2018-2021)* (Report, November 2021) 10.

7.7. There are fairly prescriptive requirements imposed on the content of IFA clauses. Section 144 provides:

> *Requirements for flexibility terms*
>
> (4) The flexibility term must:
>
> (a) identify the terms of the modern award the effect of which may be varied by an individual flexibility arrangement; and
>
> (b) require that the employee and the employer genuinely agree to any individual flexibility arrangement; and
>
> (c) require the employer to ensure that any individual flexibility arrangement must result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to; and
>
> (d) set out how any flexibility arrangement may be terminated by the employee or the employer; and
>
> (e) require the employer to ensure that any individual flexibility arrangement must be in writing and signed:
>
> (i) in all cases--by the employee and the employer; and
>
> (ii) if the employee is under 18--by a parent or guardian of the employee; and
>
> (f) require the employer to ensure that a copy of any individual flexibility arrangement must be given to the employee.
>
> (5) Except as required by subparagraph (4)(e)(ii), the flexibility term must not require that any individual flexibility arrangement agreed to by an employer and employee under the term must be approved, or consented to, by another person.

7.8. Proposal F would not affect the clauses' satisfaction of any of the requirements except paragraph (c).

7.9. The two questions relevant to Proposal F are therefore:

(1) whether the proposed new subclause is *capable* of being inserted into the awards; and

(2) whether the proposed new subclause *should* be inserted into the awards.

7.10. Each of these questions are addressed below.

(1) Satisfaction of Statutory Requirements

7.11. As noted, IFA clauses must:

> (c) require the employer to ensure that any individual flexibility arrangement must result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to; and

7.12. The FW Act does not define the phrase "better off overall" specifically in relation to IFAs.

7.13. However, there is a presumption that words and phrases are used consistently throughout a statute.[76] Although the "better off overall test"[77] that must be passed by proposed enterprise agreements as a precondition of approval has been subject to significant dispute in the FWC and the courts, the phrase "better off overall" itself does not appear to have been precisely defined. However, the High Court accepted a submission that:

> the BOOT "requires an overall assessment to be made", which in turn "requires the identification of terms which are more beneficial for an employee, terms which are less beneficial and an overall assessment of whether an employee would be better off under the agreement". What is involved is a comparison between terms and conditions under the agreement and the terms and conditions under the modern award.[78]

7.14. In addition, the High Court held that the better off overall test "may be contrasted with the "no disadvantage" test which was the legislative predecessor of the BOOT".[79]

7.15. We are satisfied that our definition of the phrase "better off overall" is not contrary to the FW Act. At the outset, it should be recognised that the rule that a phrase must have a consistent meaning throughout a statute is "only a presumption".[80] It "must yield to the requirements of the context".[81] "It is well recognised that a word may be used in two different senses in the same section of the one Act".[82]

7.16. That aside, it is not submitted that the phrase "better off overall" possesses a drastically different meaning in each context. Both IFAs and enterprise agreements require the provision of more favourable terms and conditions in comparison with the applicable modern award in an overall sense.

7.17. However, the new words would clarify that this does not preclude circumstances where, all else being held equal, the IFA can provide more favourable terms and conditions by virtue of being preferred by the employee. This is entirely consistent with the natural and ordinary meaning of the phrase "better off overall": the preference for or weight attached to the terms of the IFA by the employee is a benefit that can render the agreement more favourable than the award.

7.18. The words "because it better meets their genuine needs" would reflect the purpose of IFAs. While enterprise agreements are focussed on the general terms and conditions provided to each employee, primarily but not exclusively in a monetary sense, IFAs must be entered "in order to meet the genuine needs of both the employee and the employer" (clause X.1). If the IFA achieves this purpose in a way that is preferable to the employee, but its terms are otherwise equivalent to the relevant modern award, it will nevertheless result in the employee being "better off overall".

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[76] See *Clyne v Deputy Federal Commissioner of Taxation* (1981) 150 CLR 1.
[77] *Fair Work Act 2009* (Cth) s 193.
[78] *ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees Association* (2017) 262 CLR 593, 620 [92].
[79] Ibid 620 [93].
[80] *Inland Revenue Commissioners v Littlewoods Mail Order Stores Ltd* [1963] AC 135, 159.
[81] *Madras Electric Supply Corp Ltd v Boarland* [1955] AC 667, 685.
[82] *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 643 (Gibbs J).

7.19. This distinction in the approach to whether an IFA vis-à-vis a proposed enterprise agreement leaves an employee "better off overall" is further explained by the nature of the respective agreements. The FWC cannot easily ascertain the preferences for, or weights attached to, various terms and conditions in the proposed enterprise agreement by the employees whom it would cover; the employees' views are primarily encapsulated in their expression of genuine agreement including through a majority vote. The relevant employees will rarely have identical preferences for, or attach the same weights of benefit to, the terms of the proposed agreement, and in many cases, there will be significant diversity in those preferences even where there is majority or stronger support for the agreement. For example, while some employees may prefer the proposed agreement because of the rolling up of rates that allows them to work at preferable hours, others may simply prefer the more generous leave entitlements it offers. Moreover, the FWC is bound to consider whether the proposed enterprise agreement leaves "each reasonably foreseeable employee" employee "better off overall", whose preferences cannot be ascertained by the FWC.[83]

7.20. For IFAs, by contrast, its application to an individual employee means that their preferences can be clearly identified. These preferences can therefore be taken into account when considering whether the agreement leaves the employee "better off overall".

7.21. Even with this distinction, there are analogous considerations taken into account when assessing whether a proposed enterprise agreement leaves each employee "better off overall". The FWC is bound to consider any views relating to whether it does so that are expressed by the relevant employees and their bargaining representatives,[84] with primary consideration given to common views expressed.[85] Clearly, the preferences and value attached to the terms of the proposed agreement are considered when assessing whether it leaves each employee "better off overall".

7.22. Consideration of the preferences and needs of the employee is also consistent with the advice of the Fair Work Ombudsman (**FWO**). In their *Use of individual flexibility arrangements Best Practice Guide*, the FWO notes that "[w]hen deciding if the employee is better off overall you should consider the following questions" including:[86]

- Are there any other circumstances or characteristics unique to the employee that should be considered? (For example, factors such as the employee's family commitments, their health, whether they have a second job, study or other interests.)

[83] *Fair Work Act 2009* (Cth) s 193.
[84] Ibid s 193A(3)(b)-(c).
[85] Ibid s 193A(4).
[86] Fair Work Ombudsman, *Use of individual flexibility arrangements Best Practice Guide* <https://www.fairwork.gov.au/sites/default/files/migration/711/Use-of-individual-flexibility-arrangements-best-practice-guide.pdf>.

7.23. This question clearly recognises that the employee's "genuine needs" should be considered when determining whether the IFA leaves the employee "better off overall".

7.24. In summary, the proposed new wording would not seek to substitute the "better off overall" test for IFAs with the distinct "no disadvantage test" that formerly applied to enterprise agreements. It would merely recognise the fact that where an IFA is otherwise equivalent in benefit to the award, the preferences of the employee considering their "genuine needs" would successfully render it "better off overall". This would make awards easier to use for the below reasons.

(2) Merits of Proposal

7.25. The merits of Proposal F are relatively simple.

7.26. IFAs can offer employers and employee significant benefits to productivity and flexibility; however, they are currently underutilised. Proposal F would, to some degree, provide parties with a clearer understanding of how an IFA could be entered into to obtain these benefits. It would achieve this by assuring parties that even if an IFA does not result in an employee being "better off overall" in a strict monetary or quantifiable sense, if the terms of the IFA are at least equivalent to the modern award, the employee's preference for the IFA on the basis of their genuine needs would make the IFA mechanism accessible.

Modern Awards Objective

7.27. Proposal F would make IFA clauses more "easy to understand".[87] It would do so by clarifying how an employee can be made better off overall under an IFA.

7.28. By making IFAs more usable and accessible, further benefits to the considerations under the modern awards objective would also arise. Primarily, making IFAs easier to use would "promote flexible modern work practices".[88] It would also likely "promote … the efficient and productive performance of work" given the improved ability for businesses to tailor award terms to their genuine needs.[89] Additionally, it would reduce "the regulatory burden" involved in being bound to the terms specified in the awards and thereby minimise the detrimental "impact of any exercise of modern award powers on business".[90]

7.29. Proposal F may also address "the needs of the low paid".[91] In the absence of these clauses, employers paying workers close to the minimum award rates may be deterred form entering into IFAs because of a misunderstanding that such agreements require the employee to be "better off overall" in a monetary

[87] *Fair Work Act 2009* (Cth) s 134(1)(g).
[88] Ibid s 134(1)(d).
[89] See ibid.
[90] Ibid s 134(1)(f).
[91] Ibid s 134(1)(a).

sense, which they may be unable to afford. The new clauses would clarify for such employers that this is not so and thereby provide opportunities for greater flexibility for low paid employees.

Review Condition

7.30. Proposal F does not result in a reduction in worker entitlements. Under this proposal IFAs will continue to require the provision of more favourable terms and conditions in comparison with the applicable modern award in an overall sense.

8 Clerks Award – Rest Periods Clause

Proposal G

8.1. Clause 22 of the *Clerks – Private Sector Award 2020* should be replaced with the following clause:

22. Rest period after working overtime (employees other than shiftworkers)

22.1 Clause 22 applies to full-time and part-time employees who are not working shifts.

22.2 Employees must, wherever reasonably practical, have at least 10 consecutive hours off duty between hours worked on successive days after working overtime.

22.3 Where an employee would be required to start working their ordinary hours without having had 10 consecutive hours off duty due to working overtime, an employer may either:

(a) release the employee from duty for certain ordinary hours pursuant to clause 22.4; or

(b) pay the employee at a higher rate pursuant to clause 22.5.

22.4 Where an employer decides to release the employee from duty under clause 22.3(a):

(a) the employee is released from duty for sufficient hours until they have had 10 consecutive hours off duty; and

(b) the employee must not suffer any loss of pay for any ordinary hours that the employee did not work as a result of being released from duty.

22.4 Where an employer decides to pay the employee at a higher rate under clause 22.3(b):

(a) the employer must pay the employee at 200% of the employee's minimum hourly rate until such time as the employee is released from duty;

(b) after working the ordinary hours, the employer must release the employee from duty until the employee has then had 10 consecutive hours off duty; and

(c) the employee must not suffer any loss of pay for any ordinary hours that the employee did not work as a result of being released from duty.

22.5 For the purposes of clause 22, overtime worked in the circumstances specified in clause 21.5 must not be regarded as overtime.

Submissions

8.2. Proposal G is merely an attempt to make the existing rest period clause in the award more user-friendly. The current clause is complex, difficult to navigate, and generally requires more than one read through to properly understand its effect. This should be remedied to make the award easier to use, particularly given that the commencement of ordinary hours after the working of overtime is likely prevalent for clerical employees.

8.3. Proposal G does not affect (and therefore would not result in a reduction in) worker entitlements.

9 Arrangement Schedules

Proposal and Submissions

9.1. In this section we are not advancing a formal proposal in the sense of including specific wording of a clause or variation. However, it is an idea that we consider worthy of the FWC's consideration for its report, given its potential to enhance the usability of awards.

9.2. In sections 4 and 7 of this submission, we indicate that employers face frequent difficulties when considering whether or how to enter individual flexibility arrangements and annualised wage arrangements. This is problematic because both mechanisms provide substantial opportunities to "promote flexible modern work practices and the efficient and productive performance of work";[92] minimise the "impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden";[93] and "ensure a simple, easy to understand, stable and sustainable modern award system".[94]

9.3. In addition to the proposals advanced in those sections, there is another possible means by which these mechanisms could be made easier to us.

9.4. Schedules could be inserted into the modern awards that relate to each type of arrangement (where relevant, noting that not all of the Common Awards contain annualised wage arrangement provisions). These schedules could provide brief guidance, templates and/or examples in relation to how the requirements applying to these arrangements could be met.

9.5. Additionally, in relation to annualised wage arrangements specifically, the schedule could provide a dollar figure or simple method of calculating the annual wage that would be necessary to satisfy the award requirements for standard full-time employee in different classifications. The awards containing these provisions could allow for the payment of this dollar figure to satisfy the employer's obligation to ensure that they are compensated at a level that is no less than they otherwise would have in the absence of the arrangement. This should not exclude employers' choice to conduct their own calculations, however, it would provide small businesses with the opportunity to rely on this schedule where it is impractical or difficult to do so themselves.

[92] *Fair Work Act 2009* (Cth) s 134(1)(d).
[93] Ibid s 134(1)(f).
[94] Ibid s 134(1)(g).

10 Annexure 1 — Proposals

Proposal A — Superannuation Clauses

The superannuation clauses all seven of the Common Awards should be replaced with a new clause which appears as follows:

> **X.1 Superannuation**
>
> Superannuation entitlements are provided for in the NES and under superannuation legislation.
>
> **X.2 Default funds**
>
> Unless an employer is required by superannuation legislation to make contributions to another fund for the benefit of an employee (for example, a stapled fund), the employer must satisfy the NES requirements by making contributions to one of the following superannuation funds or its successor, provided that, in respect of new employees, the fund is able to accept new beneficiaries:
>
> (a) [Default Fund A]
>
> (b) [Default Fund B]
>
> …
>
> **X.3 Absence from work while receiving workers compensation**
>
> Subject to the governing rules of the relevant superannuation fund, the employer must make the superannuation contributions required by the NES and pay the amounts authorised by any salary sacrifice arrangement for the period of absence from work (subject to a maximum of 52 weeks) of an employee due to work-related injury or work-related illness provided that:
>
> (i) the employee is receiving workers compensation payments or is receiving regular payments directly from the employer in accordance with statutory requirements; and
>
> (ii) the employee remains employed by the employer.

The default funds that are currently specified in each Common Award should be specified in the new clause X.2.

Proposal B — Time Off in Lieu Clauses

The time off in lieu (**TOIL**) clauses in the *Clerks – Private Sector Award 2020*, *Children's Services Award 2010*, *Hospitality Industry (General) Award 2020*, and *Social, Community, Home Care and Disability Services Industry Award 2010* should be replaced with a new clause that appears as follows:

> **X.X Time off instead of payment for overtime**
>
> (a) An employer and employee may, without undue influence or pressure, freely agree in writing to the employee taking an equivalent amount of time off instead of being paid for a particular amount of overtime worked by the employee.

(b) The time off must be taken at a time or times agreed by the employer and employee.

(c) The employer must pay the employee as soon as practicable for any overtime hours that were subject to an agreement under subclause (a) and have not been taken off where:

(i) the employee decides to cancel the agreement;

(ii) the employee does not take the agreed time off within 12 months of the overtime hours being worked; or

(iii) the employment is terminated.

For the *Clerks – Private Sector Award 2020*, the new clause specified above should replace clause 23. The award should be further varied by replacing clause 29 with the following clause:

29 Time off instead of payment for overtime (shiftworkers)

Clause 23 also applies to shiftworkers.

The TOIL clauses in the *Fast Food Industry Award 2020*, *General Retail Industry Award 2020*, and *Restaurant Industry Award 2020* should be replaced with a new clause that appears as follows:

X.X Time off instead of payment for overtime

(a) An employer and employee may, without undue influence or pressure, freely agree in writing to the employee taking time off instead of being paid for a particular amount of overtime.

(b) The period of time off that an employee is entitled to take is equivalent to the overtime payment that would have been made.

EXAMPLE: By making an agreement under clause X.X, an employee who worked 2 overtime hours at the rate of 150% is entitled to 3 hours' time off.

(c) The employer must pay the employee as soon as practicable for any overtime hours that were subject to an agreement under subclause (a) and have not been taken off where:

(i) the employee decides to cancel the agreement;

(ii) the employee does not take the agreed time off within 6 months of the hours being worked; or

(iii) the employment is terminated.

Proposal C — Annualised Wage Arrangement Clauses

The annualised wage arrangement clauses in the *Clerks—Private Sector Award 2020*, the *Hospitality Industry (General) Award 2020* and the *Restaurant Industry Award 2020* (i.e. the Common Awards with such clauses) should be replaced with the following new clause:

X. Annualised wage arrangements

X.1 Annualised wage instead of award provisions

(a) An employer may pay a full time employee an annualised wage in satisfaction of any or all of the following provisions of the award:

[specified clauses]

(b) Where an annualised wage is paid, the employer must advise the employee in writing, and keep a record of:

(i) the annualised wage that is payable; and

(ii) which of the provisions of this award will be satisfied by payment of the annualised wage.

X.2 Annualised wage not to disadvantage employees

(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or, if the employment ceases earlier, over such lesser period as has been worked).

(b) At least once per year, the employer must review the annualised wage of the employee to ensure that the compensation is no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid.

X.3 Base rate of pay for employees on annualised wage arrangements

For the purposes of the NES , the base rate of pay of an employee receiving an annualised wage under clause X comprises the portion of the annualised wage equivalent to the relevant rate of pay in clause X — Minimum rates and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

The same clauses in the awards that the existing annualise wage arrangement clauses specify can be satisfied by the payment of an annualised salary should be replicated in the new clauses at clause X.1(a).

Proposal D — Excessive Annual Leave Accrual Clauses

The clauses in each of the Common Awards relating to excessive annual leave accruals should be replaced with the following clause:

X.X Excessive leave accruals

Despite anything else in this clause, an employer may direct an employee to take a period of paid annual leave if:

(a) the employer has genuinely tried to reach agreement with the employee on how to reduce their annual leave accrual;

(b) the employee has accrued at least 8 weeks of annual leave (or 10 weeks' paid annual leave for a shiftworker);

(c) the employer gives the employee no less than 8 weeks' notice to take the annual leave; and

(d) the employee retains at least 6 weeks of accrued annual leave after the direction is given by the employer.

The *Fast Food Industry Award 2020* does not have provisions applying to "shiftworkers" and thus the words "(or 10 weeks' paid annual leave for a shiftworker)" in subclause (b) should be omitted in the clause in that award.

Proposal E — Consultation Clauses

The consultation clauses (relating both to major workplace changes and roster changes) in each of the Common Awards should be replaced with the following clause:

X Consultation

X.1 In this clause, **significant effects** on employees include any of the following:

(a) termination of employment; or

(b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or

(c) loss of, or reduction in, job or promotion opportunities; or

(d) loss of, or reduction in, job tenure; or

(e) alteration of hours of work; or

(f) the need for employees to be retrained or transferred to other work or locations; or

(g) job restructuring.

X.2 This clause applies if the employer:

(a) makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees; or

(b) proposes to change the regular roster or ordinary hours of work of an employee, other than an employee whose working hours are irregular, sporadic or unpredictable.

X.3 As soon as practicable, the employer must:

(a) inform, in writing, the affected employees and their representatives (if any) of all reasonably relevant information about the changes, including:

(i) what the change is; and

(ii) how the change is likely to affect the employees ; and

(b) invite the affected employees and their representatives (if any) to discuss the change, its expected effect, and possible measures to minimise its adverse effects; and

(c) promptly consider any views expressed by the affected employees and their representatives (if any).

X.4 For the purposes of consultation about a change in the regular roster or ordinary hours of work of an employee, references to "employees" in clause X.3 include an individual employee.

Proposal F — Individual Flexibility Arrangement Clauses

The clauses relating to individual flexibility arrangements (**IFA**s) in each of the Common Awards should be amended to include the following additional clause:

X.5 An agreement must result in the employee being better off overall at the time the agreement is made than if the agreement had not been made.

X.6 For the purposes of clause X.5, an employee would be better off overall if the agreement:

(a) does not disadvantage the employee overall; and

(b) is preferred by the employee in comparison with the relevant award terms because it better meets their genuine needs.

The successive clauses should then be renumbered accordingly.

Proposal G — Clerks Award – Rest Periods Clause

Clause 22 of the *Clerks – Private Sector Award 2020* should be replaced with the following clause:

22. Rest period after working overtime (employees other than shiftworkers)

22.1 Clause 22 applies to full-time and part-time employees who are not working shifts.

22.2 Employees must, wherever reasonably practical, have at least 10 consecutive hours off duty between hours worked on successive days after working overtime.

22.3 Where an employee would be required to start working their ordinary hours without having had 10 consecutive hours off duty due to working overtime, an employer may either:

(a) release the employee from duty for certain ordinary hours pursuant to clause 22.4; or

(b) pay the employee at a higher rate pursuant to clause 22.5.

22.4 Where an employer decides to release the employee from duty under clause 22.3(a):

(a) the employee is released from duty for sufficient hours until they have had 10 consecutive hours off duty; and

(b) the employee must not suffer any loss of pay for any ordinary hours that the employee did not work as a result of being released from duty.

22.4 Where an employer decides to pay the employee at a higher rate under clause 22.3(b):

(a) the employer must pay the employee at 200% of the employee's minimum hourly rate until such time as the employee is released from duty;

(b) after working the ordinary hours, the employer must release the employee from duty until the employee has then had 10 consecutive hours off duty; and

(c) the employee must not suffer any loss of pay for any ordinary hours that the employee did not work as a result of being released from duty.

22.5 For the purposes of clause 22, overtime worked in the circumstances specified in clause 21.5 must not be regarded as overtime.

11 Annexure 2 — Clause Comparison

Proposal A — Superannuation Clauses

Existing Clause	Proposed Clause
X.1 Superannuation legislation (a) Superannuation legislation, including the Superannuation Guarantee (Administration) Act 1992 (Cth), the Superannuation Guarantee Charge Act 1992 (Cth), the Superannuation Industry (Supervision) Act 1993 (Cth) and the Superannuation (Resolution of Complaints) Act 1993 (Cth), deals with the superannuation rights and obligations of employers and employees. Under superannuation legislation individual employees generally have the opportunity to choose their own superannuation fund. If an employee does not choose a superannuation fund, any superannuation fund nominated in the award covering the employee applies. (b) The rights and obligations in these clauses supplement those in superannuation legislation. **X.2 Employer contributions** An employer must make such superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay the superannuation guarantee charge under superannuation legislation with respect to that employee. **X.3 Voluntary employee contributions** (a) Subject to the governing rules of the relevant superannuation fund, an employee may, in writing, authorise their employer to pay on behalf of the employee a specified amount from the	**X.1 Superannuation** Superannuation entitlements are provided for in the NES and under superannuation legislation. **X.2 Default funds** Unless an employer is required by superannuation legislation to make contributions to another fund for the benefit of an employee (for example, a stapled fund), the employer must satisfy the NES requirements by making contributions to one of the following superannuation funds or its successor, provided that, in respect of new employees, the fund is able to accept new beneficiaries: (a) [Default Fund A] (b) [Default Fund B] … **X.3 Absence from work while receiving workers compensation** Subject to the governing rules of the relevant superannuation fund, the employer must make the superannuation contributions required by the NES and pay the amounts authorised by any salary sacrifice arrangement for the period of absence from work (subject to a maximum of 52 weeks) of an employee due to work-related injury or work-related illness provided that: (i) the employee is receiving workers compensation payments or is receiving regular payments directly from the employer

post-taxation wages of the employee into the same superannuation fund as the employer makes the superannuation contributions provided for in clause X.2. (b) An employee may adjust the amount the employee has authorised their employer to pay from the wages of the employee from the first of the month following the giving of three months' written notice to their employer. (c) The employer must pay the amount authorised under clauses X.3(a) or X.3(b) no later than 28 days after the end of the month in which the deduction authorised under clauses X.3(a) or X.3(b) was made. **X.4 Superannuation fund** Unless, to comply with superannuation legislation, the employer is required to make the superannuation contributions provided for in clause X.2 to another superannuation fund that is chosen by the employee, the employer must make the superannuation contributions provided for in clause X.2 and pay the amount authorised under clauses X.3(a) or X.3(b) to one of the following superannuation funds or its successor: (a) [default fund A] (b) [default fund B] (c) … **X.5 Absence from work** Subject to the governing rules of the relevant superannuation fund, the employer must also make the superannuation contributions provided for in clause X.2 and pay the amount authorised under clauses X.3(a) or X.3(b):	in accordance with statutory requirements; and (ii) the employee remains employed by the employer.

(a) Paid leave—while the employee is on any paid leave. (b) Work-related injury or illness—For the period of absence from work (subject to a maximum of 52 weeks) of the employee due to work-related injury or work-related illness provided that: (i) the employee is receiving workers compensation payments or is receiving regular payments directly from the employer in accordance with statutory requirements; and (ii) the employee remains employed by the employer	

Proposal B — Time Off in Lieu Clauses

Existing Clause in Clerks Award	Proposed Clause in Clerks Award
X.1 Time off instead of payment for overtime (a) An employee and employer may agree in writing to the employee taking time off instead of being paid for a particular amount of overtime that has been worked by the employee. (b) Any amount of overtime that has been worked by an employee in a particular pay period and that is to be taken as time off instead of the employee being paid for it must be the subject of a separate agreement under clause A.1. (c) An agreement must state each of the following:	**X.1 Time off instead of payment for overtime** (a) An employer and employee may agree in writing to the employee taking an equivalent amount of time off instead of being paid for a particular amount of overtime worked by the employee, provided that no undue influence or undue pressure is exerted on either party. (b) The time off must be taken at a time or times agreed by the employer and employee. (c) The employer must pay the employee as soon as practicable for any overtime hours that were subject to an agreement under subclause (a) and have not been taken off where:

(i) the number of overtime hours to which it applies and when those hours were worked; (ii) that the employer and employee agree that the employee may take time off instead of being paid for the overtime; (iii) that, if the employee requests at any time, the employer must pay the employee, for overtime covered by the agreement but not taken as time off, at the overtime rate applicable to the overtime when worked; (iv) that any payment mentioned in subparagraph (iii) must be made in the next pay period following the request. Note: An example of the type of agreement required by this clause is set out at Schedule [x]. There is no requirement to use the form of agreement set out at Schedule [x]. An agreement under clause A.1 can also be made by an exchange of emails between the employee and employer, or by other electronic means. (d) The period of time off that an employee is entitled to take is the same as the number of overtime hours worked. EXAMPLE: By making an agreement under clause A.1 an employee who worked 2 overtime hours is entitled to 2 hours' time off. (e) Time off must be taken: (i) within the period of 6 months after the overtime is worked; and	(i) the employee decides to cancel the agreement; (ii) the employee does not take the agreed time off within 12 months of the overtime hours being worked; or (iii) the employment is terminated.

	(ii) at a time or times within that period of 6 months agreed by the employee and employer.	
(f)	If the employee requests at any time to be paid for overtime covered by an agreement under clause A.1 but not taken as time off, the employer must pay the employee for the overtime, in the next pay period following the request, at the overtime rate applicable to the overtime when worked.	
(g)	If time off for overtime that has been worked is not taken within the period of 6 months mentioned in paragraph (e), the employer must pay the employee for the overtime, in the next pay period following those 6 months, at the overtime rate applicable to the overtime when worked.	
(h)	The employer must keep a copy of any agreement under clause A.1 as an employee record.	
(i)	An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to make, or not make, an agreement to take time off instead of payment for overtime.	
(j)	An employee may, under section 65 of the Act, request to take time off, at a time or times specified in the request or to be subsequently agreed by the employer and the employee, instead of being paid for overtime worked by the employee. If the employer agrees to the request then clause A.1 will apply, including the	

requirement for separate written agreements under paragraph (b) for overtime that has been worked. Note: If an employee makes a request under section 65 of the Act for a change in working arrangements, the employer may only refuse that request on reasonable business grounds (see section 65(5) of the Act). (k) If, on the termination of the employee's employment, time off for overtime worked by the employee to which clause A.1 applies has not been taken, the employer must pay the employee for the overtime at the overtime rate applicable to the overtime when worked. Note: Under section 345(1) of the Act, a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person under clause A.1.	

Proposal C — Annualised Wage Arrangement Clauses

Existing Clause	Proposed Clause
18. Annualised wage arrangements **18.1 Annualised wage instead of award provisions** (a) An employer may pay a full-time employee an annualised wage in satisfaction, subject to clause 18.1(c), of any or all of the following provisions of the award: (i) clause 13.8 (Make-up time); and (ii) clause 16 — Minimum rates ; and (iii) clause 19 — Allowances ; and (iv) clause 21 — Overtime (employees	**18. Annualised wage arrangements** **18.1 Annualised wage instead of award provisions** (a) An employer may pay a full-time employee an annualised wage in satisfaction~~, subject to clause 18.1(c),~~ of any or all of the following provisions of the award: (i) clause 13.8 (Make-up time); and (ii) clause 16 — Minimum rates ; and (iii) clause 19 — Allowances ; and (iv) clause 21 — Overtime (employees other than shiftworkers) ; and

other than shiftworkers) ; and (v) clause 22 — Rest period after working overtime (employees other than shiftworkers) ; and (vi) clause 23 — Time off instead of payment for overtime (employees other than shiftworkers) ; and (vii) clause 24 — Penalty rates (employees other than shiftworkers) ; and (viii) clause 26 — Ordinary hours of work and rostering for shiftwork ; and (ix) clause 28 — Overtime for shiftwork ; and (x) clause 29 — Time off instead of payment for overtime for shiftwork ; and (xi) clause 30 — Rest period after working overtime for shiftwork ; and (xii) clause 31 — Penalty rates for shiftwork ; and (xiii) clause 32.3 — Annual leave loading . (b) Where an annualised wage is paid, the employer must advise the employee in writing, and keep a record of: (i) the annualised wage that is payable; (ii) which of the provisions of this award will be satisfied by payment of the annualised wage; (iii) the method by which the annualised wage has been calculated, including specification of each separate	(v) clause 22 — Rest period after working overtime (employees other than shiftworkers) ; and (vi) clause 23 — Time off instead of payment for overtime (employees other than shiftworkers) ; and (vii) clause 24 — Penalty rates (employees other than shiftworkers) ; and (viii) clause 26 — Ordinary hours of work and rostering for shiftwork ; and (ix) clause 28 — Overtime for shiftwork ; and (x) clause 29 — Time off instead of payment for overtime for shiftwork ; and (xi) clause 30 — Rest period after working overtime for shiftwork ; and (xii) clause 31 — Penalty rates for shiftwork ; and (xiii) clause 32.3 — Annual leave loading . (b) Where an annualised wage is paid, the employer must advise the employee in writing, and keep a record of: (i) the annualised wage that is payable; and (ii) which of the provisions of this award will be satisfied by payment of the annualised wage~~;~~. ~~(iii) the method by which the annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculation; and~~ ~~(iv) the outer limit number of ordinary hours~~

component of the annualised wage and any overtime or penalty assumptions used in the calculation; and	~~which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause 18.1(c) .~~
(iv) the outer limit number of ordinary hours which would attract the payment of a penalty rate under the award and the outer limit number of overtime hours which the employee may be required to work in a pay period or roster cycle without being entitled to an amount in excess of the annualised wage in accordance with clause 18.1(c).	~~(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified pursuant to clause 18.1(b)(iv) , such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.~~
(c) If in a pay period or roster cycle an employee works any hours in excess of either of the outer limit amounts specified pursuant to clause 18.1(b)(iv) , such hours will not be covered by the annualised wage and must separately be paid for in accordance with the applicable provisions of this award.	**18.2 Annualised wage not to disadvantage employees**
18.2 Annualised wage not to disadvantage employees	(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or, if the employment ceases earlier, over such lesser period as has been worked).
(a) The annualised wage must be no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid (or, if the employment ceases earlier, over such lesser period as has been worked).	(b) At least once per year, the employer must review the annualised wage of the employee to ensure that the compensation is no less than the amount the employee would have received under this award for the work performed over the year for which the wage is paid.
(b) The employer must each 12 months from the commencement of the annualised wage arrangement or upon the termination of employment of the employee calculate the amount of remuneration that would have	~~(c) The employer must each 12 months from the commencement of the annualised wage arrangement or upon the termination of employment of the employee calculate the amount of remuneration that would have been payable to the employee under the provisions of~~

been payable to the employee under the provisions of this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 14 days. (c) The employer must keep a record of the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause 18.2(b) . This record must be signed by the employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle. **18.3 Base rate of pay for employees on annualised wage arrangements** (a) For the purposes of the NES , the base rate of pay of an employee receiving an annualised wage under clause 18 comprises the portion of the annualised wage equivalent to the relevant rate of pay in clause 16 — Minimum rates and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.	~~this award over the relevant period and compare it to the amount of the annualised wage actually paid to the employee. Where the latter amount is less than the former amount, the employer shall pay the employee the amount of the shortfall within 14 days.~~ ~~(d) The employer must keep a record of the starting and finishing times of work, and any unpaid breaks taken, of each employee subject to an annualised wage arrangement for the purpose of undertaking the comparison required by clause 18.2(b) . This record must be signed by the employee, or acknowledged as correct in writing (including by electronic means) by the employee, each pay period or roster cycle.~~ **18.3 Base rate of pay for employees on annualised wage arrangements** For the purposes of the NES , the base rate of pay of an employee receiving an annualised wage under clause 18 comprises the portion of the annualised wage equivalent to the relevant rate of pay in clause 16 — Minimum rates and excludes any incentive-based payments, bonuses, loadings, monetary allowances, overtime and penalties.

Proposal D — Excessive Annual Leave Accrual Clauses

Existing Clause in Clerks Award	Proposed Clause
32.6 Excessive leave accruals: general provision	**X.X Excessive leave accruals**

NOTE: Clauses 32.6 to 32.8 contain provisions, additional to the NES , about the taking of paid annual leave as a way of dealing with the accrual of excessive paid annual leave. See Part 2.2, Division 6 of the Act . (a) An employee has an excessive leave accrual if the employee has accrued more than 8 weeks' paid annual leave (or 10 weeks' paid annual leave for a shiftworker, as defined by clause 32.2). (b) If an employee has an excessive leave accrual, the employer or the employee may seek to confer with the other and genuinely try to reach agreement on how to reduce or eliminate the excessive leave accrual. (c) Clause 32.7 sets out how an employer may direct an employee who has an excessive leave accrual to take paid annual leave. (d) Clause 32.8 sets out how an employee who has an excessive leave accrual may require an employer to grant paid annual leave requested by the employee. **32.7 Excessive leave accruals: direction by employer that leave be taken** (a) If an employer has genuinely tried to reach agreement with an employee under clause 32.6(b) but agreement is not reached (including because the employee refuses to confer), the employer may direct the employee in writing to take one or more periods of paid annual leave. (b) However, a direction by the employer under clause 32.7(a): (i) is of no effect if it would result at any time in the employee's remaining	Despite anything else in this clause, an employer may direct an employee to take a period of paid annual leave if: (a) the employer has genuinely tried to reach agreement with the employee on how to reduce their annual leave accrual; (b) the employee has accrued at least 8 weeks of annual leave (or 10 weeks' paid annual leave for a shiftworker); (c) the employer gives the employee no less than 8 weeks' notice to take the annual leave; and (d) the employee retains at least 6 weeks of accrued annual leave after the direction is given by the employer.

accrued entitlement to paid annual leave being less than 6 weeks when any other paid annual leave arrangements (whether made under clause 32.6 , 32.7 or 32.8 or otherwise agreed by the employer and employee) are taken into account; and (ii) must not require the employee to take any period of paid annual leave of less than one week; and (iii) must not require the employee to take a period of paid annual leave beginning less than 8 weeks, or more than 12 months, after the direction is given; and (iv) must not be inconsistent with any leave arrangement agreed by the employer and employee. (c) The employee must take paid annual leave in accordance with a direction under clause 32.7(a) that is in effect. (d) An employee to whom a direction has been given under clause 32.7(a) may request to take a period of paid annual leave as if the direction had not been given. NOTE 1: Paid annual leave arising from a request mentioned in clause 32.7(d) may result in the direction ceasing to have effect. See clause 32.7(b)(i) . NOTE 2: Under section 88(2) of the Act , the employer must not unreasonably refuse to agree to a request by the employee to take paid annual leave. **32.8 Excessive leave accruals: request by employee for leave** (b) If an employee has genuinely tried to reach agreement with an employer under clause	

32.6(b) but agreement is not reached (including because the employer refuses to confer), the employee may give a written notice to the employer requesting to take one or more periods of paid annual leave. (c) However, an employee may only give a notice to the employer under clause 32.8(a) if: (i) the employee has had an excessive leave accrual for more than 6 months at the time of giving the notice; and (ii) the employee has not been given a direction under clause 32.7(a) that, when any other paid annual leave arrangements (whether made under clause 32.6 , 32.7 or 32.8 or otherwise agreed by the employer and employee) are taken into account, would eliminate the employee's excessive leave accrual. (d) A notice given by an employee under clause 32.8(a) must not: (i) if granted, result in the employee's remaining accrued entitlement to paid annual leave being at any time less than 6 weeks when any other paid annual leave arrangements (whether made under clause 32.6 , 32.7 or 32.8 or otherwise agreed by the employer and employee) are taken into account; or (ii) provide for the employee to take any period of paid annual leave of less than one week; or (iii) provide for the employee to take a period of paid annual leave beginning	

less than 8 weeks, or more than 12 months, after the notice is given; or (iv) be inconsistent with any leave arrangement agreed by the employer and employee. (e) An employee is not entitled to request by a notice under clause 32.8(a) more than 4 weeks' paid annual leave (or 5 weeks' paid annual leave for a shiftworker, as defined by clause 32.2) in any period of 12 months. The employer must grant paid annual leave requested by a notice under clause 32.8(a).	

Proposal E — Consultation Clauses

Existing Clause	Proposed Clause
38. Consultation about major workplace change 38.1 If an employer makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the employer must: (a) give notice of the changes to all employees who may be affected by them and their representatives (if any); and (b) discuss with affected employees and their representatives (if any): (i) the introduction of the changes; and (ii) their likely effect on employees; and (iii) measures to avoid or reduce the adverse effects of the changes on employees; and	**X Consultation** **X.1** This clause applies if the employer: (a) makes a definite decision to make major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees; or (b) proposes to change the regular roster or ordinary hours of work of an employee, other than an employee whose working hours are irregular, sporadic or unpredictable. **X.2** In this clause, **significant effects** on employees include any of the following: (a) termination of employment; or (b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or

(c) commence discussions as soon as practicable after a definite decision has been made. 38.2 For the purposes of the discussion under clause 38.1(b) , the employer must give in writing to the affected employees and their representatives (if any) all relevant information about the changes including: (a) their nature; and (b) their expected effect on employees; and (c) any other matters likely to affect employees. 38.3 Clause 38.2 does not require an employer to disclose any confidential information if its disclosure would be contrary to the employer's interests. 38.4 The employer must promptly consider any matters raised by the employees or their representatives about the changes in the course of the discussion under clause 38.1(b) . 38.5 In clause 38 **significant effects** , on employees, includes any of the following: (a) termination of employment; or (b) major changes in the composition, operation or size of the employer's workforce or in the skills required; or (c) loss of, or reduction in, job or promotion opportunities; or (d) loss of, or reduction in, job tenure; or (e) alteration of hours of work; or (f) the need for employees to be retrained or transferred to other work or locations; or (g) job restructuring.	(c) loss of, or reduction in, job or promotion opportunities; or (d) loss of, or reduction in, job tenure; or (e) alteration of hours of work; or (f) the need for employees to be retrained or transferred to other work or locations; or (g) job restructuring. **X.3** As soon as practicable, the employer must: (a) inform, in writing, the affected employees and their representatives (if any) of all reasonably relevant information about the changes, including: (i) what the change is; and (ii) how the change is likely to affect the employees; and (b) invite the affected employees and their representatives (if any) to discuss the change, its expected effect, and possible measures to minimise its adverse effects; and (c) promptly consider any views expressed by the affected employees and their representatives (if any). **X.4** For the purposes of consultation about a change in the regular roster or ordinary hours of work of an employee, references to "employees" in clause X.3 include an individual employee.

38.6 Where this award makes provision for alteration of any of the matters defined at clause 38.5 , such alteration is taken not to have significant effect. **39. Consultation about changes to rosters or hours of work** 39.1 Clause 39 applies if an employer proposes to change the regular roster or ordinary hours of work of an employee, other than an employee whose working hours are irregular, sporadic or unpredictable. 39.2 The employer must consult with any employees affected by the proposed change and their representatives (if any). 39.3 For the purpose of the consultation, the employer must: (a) provide to the employees and representatives mentioned in clause 39.2 information about the proposed change (for example, information about the nature of the change and when it is to begin); and (b) invite the employees to give their views about the impact of the proposed change on them (including any impact on their family or caring responsibilities) and also invite their representative (if any) to give their views about that impact. 39.4 The employer must consider any views given under clause 39.3(b) . 39.5 Clause 39 is to be read in conjunction with any other provisions of this award concerning the scheduling of work or the giving of notice.	

Proposal F — Individual Flexibility Arrangement Clauses

Existing Clause	Proposed Clause
5. Individual flexibility arrangements 5.1 Despite anything else in this award, an employer and an individual employee may agree to vary the application of the terms of this award relating to any of the following in order to meet the genuine needs of both the employee and the employer: (a) arrangements for when work is performed; or (b) overtime rates; or (c) penalty rates; or (d) allowances; or (e) annual leave loading. 5.2 An agreement must be one that is genuinely made by the employer and the individual employee without coercion or duress. 5.3 An agreement may only be made after the individual employee has commenced employment with the employer. 5.4 An employer who wishes to initiate the making of an agreement must: (a) give the employee a written proposal; and (b) if the employer is aware that the employee has, or should reasonably be aware that the employee may have, limited understanding of written English, take reasonable steps (including providing a translation in an appropriate language) to ensure that the employee understands the proposal.	**5. Individual flexibility arrangements** 5.1 Despite anything else in this award, an employer and an individual employee may agree to vary the application of the terms of this award relating to any of the following in order to meet the genuine needs of both the employee and the employer: (a) arrangements for when work is performed; or (b) overtime rates; or (c) penalty rates; or (d) allowances; or (e) annual leave loading. 5.2 An agreement must be one that is genuinely made by the employer and the individual employee without coercion or duress. 5.3 An agreement may only be made after the individual employee has commenced employment with the employer. 5.4 An employer who wishes to initiate the making of an agreement must: (a) give the employee a written proposal; and (b) if the employer is aware that the employee has, or should reasonably be aware that the employee may have, limited understanding of written English, take reasonable steps (including providing a translation in an appropriate language) to ensure that the employee understands the proposal.

5.5 An agreement must result in the employee being better off overall at the time the agreement is made than if the agreement had not been made. 5.6 An agreement must do all of the following: (a) state the names of the employer and the employee; and (b) identify the award term, or award terms, the application of which is to be varied; and (c) set out how the application of the award term, or each award term, is varied; and (d) set out how the agreement results in the employee being better off overall at the time the agreement is made than if the agreement had not been made; and (e) state the date the agreement is to start. 5.7 An agreement must be: (a) in writing; and (b) signed by the employer and the employee and, if the employee is under 18 years of age, by the employee's parent or guardian. 5.8 Except as provided in clause 5.7(b) , an agreement must not require the approval or consent of a person other than the employer and the employee. 5.9 The employer must keep the agreement as a time and wages record and give a copy to the employee. 5.10 The employer and the employee must genuinely agree, without duress or coercion to any variation of an award provided for by an agreement. 5.11 An agreement may be terminated: (a) at any time, by written agreement between	5.5 An agreement must result in the employee being better off overall at the time the agreement is made than if the agreement had not been made. 5.6 For the purposes of clause 5.5, an employee would be better off overall if the agreement: (a) does not disadvantage the employee overall; and (b) is preferred by the employee in comparison with the relevant award terms because it better meets their genuine needs. 5.7 An agreement must do all of the following: (a) state the names of the employer and the employee; and (b) identify the award term, or award terms, the application of which is to be varied; and (c) set out how the application of the award term, or each award term, is varied; and (d) set out how the agreement results in the employee being better off overall at the time the agreement is made than if the agreement had not been made; and (e) state the date the agreement is to start. 5.8 An agreement must be: (a) in writing; and (b) signed by the employer and the employee and, if the employee is under 18 years of age, by the employee's parent or guardian. 5.9 Except as provided in clause 5.7(b) , an agreement must not require the approval or consent of a person other than the employer and the employee. 5.10 The employer must keep the agreement as a time and wages record and give a copy to the

the employer and the employee; or (b) by the employer or employee giving 13 weeks' written notice to the other party (reduced to 4 weeks if the agreement was entered into before the first full pay period starting on or after 4 December 2013). NOTE: If an employer and employee agree to an arrangement that purports to be an individual flexibility arrangement under this award term and the arrangement does not meet a requirement set out in section 144 of the Act then the employee or the employer may terminate the arrangement by giving written notice of not more than 28 days (see section 145 of the Act). 5.12 An agreement terminated as mentioned in clause 5.11(b) ceases to have effect at the end of the period of notice required under that clause. 5.13 The right to make an agreement under clause 5 is additional to, and does not affect, any other term of this award that provides for an agreement between an employer and an individual employee.	employee. 5.11 The employer and the employee must genuinely agree, without duress or coercion to any variation of an award provided for by an agreement. 5.12 An agreement may be terminated: (a) at any time, by written agreement between the employer and the employee; or (b) by the employer or employee giving 13 weeks' written notice to the other party (reduced to 4 weeks if the agreement was entered into before the first full pay period starting on or after 4 December 2013). NOTE: If an employer and employee agree to an arrangement that purports to be an individual flexibility arrangement under this award term and the arrangement does not meet a requirement set out in section 144 of the Act then the employee or the employer may terminate the arrangement by giving written notice of not more than 28 days (see section 145 of the Act). 5.13 An agreement terminated as mentioned in clause 5.11(b) ceases to have effect at the end of the period of notice required under that clause. 5.14 The right to make an agreement under clause 5 is additional to, and does not affect, any other term of this award that provides for an agreement between an employer and an individual employee.

Proposal G — Clerks Award – Rest Periods Clause

Existing Clause	Proposed Clause
22. Rest period after working overtime (employees other than shiftworkers) 22.1 Clause 22 applies to full-time and part-time	**22. Rest period after working overtime (employees other than shiftworkers)** 22.1 Clause 22 applies to full-time and part-time

employees who are not working shifts. 22.2 When overtime is required to be worked, employees must, wherever reasonably practical, have at least 10 consecutive hours off duty between hours worked on successive days. 22.3 Despite clause 22.2 but subject to clause 22.4 , where an employee, due to overtime worked, would be required to start working their ordinary hours without having had 10 consecutive hours off duty: (a) the employer must release the employee from duty after finishing the overtime until the employee has had 10 consecutive hours off duty; and (b) the employee must not suffer any loss of pay for any ordinary hours that the employee did not work as a result of being released from duty in accordance with clause 22.3(a). 22.4 If, at the direction of the employer, an employee continues work or resumes working ordinary hours without having at least 10 consecutive hours off duty in accordance with clause 22.3 , then all of the following apply: (a) the employer must pay the employee at 200% of the employee's minimum hourly rate until such time as the employee is released from duty; and (b) the employer must release the employee from duty until the employee has had 10 consecutive hours off duty; and (c) the employee must not suffer any loss of pay for any ordinary hours that the employee did not work as a result of being released from	employees who are not working shifts. 22.2 Employees must, wherever reasonably practical, have at least 10 consecutive hours off duty between hours worked on successive days after working overtime. 22.3 Where an employee would be required to start working their ordinary hours without having had 10 consecutive hours off duty due to working overtime, an employer may either: (a) release the employee from duty for certain ordinary hours pursuant to clause 22.4; or (b) pay the employee at a higher rate pursuant to clause 22.5. 22.4 Where an employer decides to release the employee from duty under clause 22.3(a): (a) the employee is released from duty for sufficient hours until they have had 10 consecutive hours off duty; and (b) the employee must not suffer any loss of pay for any ordinary hours that the employee did not work as a result of being released from duty. 22.4 Where an employer decides to pay the employee at a higher rate under clause 22.3(b): (a) the employer must pay the employee at 200% of the employee's minimum hourly rate until such time as the employee is released from duty; (b) after working the ordinary hours, the employer must release the employee from duty until the employee has then had 10 consecutive hours off duty; and (c) the employee must not suffer any loss of pay for any ordinary hours that the employee did not work as a result of being released from duty.

duty in accordance with clause 22.4(b). 22.5 Overtime worked in the circumstances specified in clause 21.5 — Return to duty must not be regarded as overtime for the purposes of clause 22 — Rest period after working overtime (employees other than shiftworkers) .	22.5 For the purposes of clause 22, overtime worked in the circumstances specified in clause 21.5 must not be regarded as overtime.

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