Australian Chamber of Commerce and Industry

Work and Care Stream of the Modern Awards Review 2023-24

ACCI Submission in Reply

26 March 2024

Australian Chamber of Commerce and Industry

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Background

1. On 12 September 2023, the President of the Fair Work Commission (**Commission**), Justice Hatcher received a letter from the Minister for Employment and Workplace Relations, the Hon Tony Burke, MP.

2. As a result, in a statement issued on 15 September 2023, the President announced the commencement of a review of modern awards to be conducted on the Commission's own motion by a 5 Member Full Bench (**Review**).[1]

3. On 29 January 2024, the Commission published a Discussion Paper: Work and Care (**Discussion Paper**) as part of the Review.

4. The Discussion Paper contains 19 questions and Parties were invited to lodge submissions in response to the Discussion Paper by 12 March 2024.

5. A 'Literature Review' was published on 8 March 2024.

6. ACCI filed its initial submission on 12 March 2024 (**Primary Submission**).

7. This submission responds to the other submissions filed on 12 March 2024 and to the Literature Review.

[1] President's Statement, Fair Work Commission, 15 September 2023.

Scope of Response

8. Given the number of submissions filed, the two-week period in which to respond to them and the sheer depth of the issues covered in response to the Discussion Paper, it is not possible in this Submission to *comprehensively* respond to each of the parties' submissions, or to the Literature Review.[2]

9. This issue, which would ordinarily be fundamental as a matter of fairness between the parties, may not present the same level of jeopardy as would ordinarily arise in contested industrial proceedings. This is because it appears the primary union submissions seem more aimed at raising issues or proposals for *discussion* or for 'noting' rather than placing 'on record' fully formed claims capable of being subject to an industrial dispute.[3]

10. Given that approach of the unions (and, with respect, the ambit nature of many of the proposals), it appears more useful to respond to the primary submissions *conceptually* rather than with respect to each and every proposal put by a party. While this submission primarily addresses the specifics of the ACTU Submissions, the overlap between the union submissions means that this submission is responsive generally.

11. Obviously, a lack of specific response in this submission to any specific position of the ACTU, its affiliates, other parties or the Literature Review should not be taken as an endorsement of that position.

12. At this stage of the Review, six critical (and likely threshold) issues of dispute appear to arise between the approach of the unions and ACCI:

    a) the role of the Fair Work Commission in this Review (see this submission from [14]);

    b) IFAs (see this submission from [30]);

    c) the correct characterisation of the existing s 65 flexibility regime (see this submission from

[2] In fairness, the Commission's initial timetable did not contemplate the filing of any reply submissions
[3] In any event, despite the scale and scope of the proposals raised in its submission, the ACTU's submission at [4] notes that it is '*not a comprehensive statement of the entirety of the concerns*.'

[43]);

d) the correct approach to what the unions identify as 'deficiencies' within the National Employment Standards (**NES**) (see this submission from [66]);

e) working from home (see this submission from [71]); and

f) the variation of Award-specific conditions on the basis of gender equality (see this submission from [76]).

13. After dealing with these issues, where appropriate and possible, ACCI will provide some response to any outstanding ACTU recommendations (see this submission from [91]) and to the Literature Review (see this submission from [106]). Given the approach of the unions and the scale and scope of the materials in the Review, this approach is likely to be more constructive than simply responding to each of the 'claims' made in the proceedings or the answers to each of the questions.

(a) The Role of the Fair Work Commission in this Review

14. Section 576 of the *Fair Work Act 2009* (Cth) (the **Act**) outlines the functions of the Commission. Relevantly, s 576 states:

(1) The FWC has the functions conferred by this Act in relation to the following subject matters:…

(b) modern awards (Part 2 - 3);…

(2) The FWC also has the following functions:

(aa) promoting cooperative and productive workplace relations and preventing disputes; …

(d) any other function conferred on the FWC by a law of the Commonwealth.

15. Section 134(1) of the Act requires the Commission, to '*ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions*', taking into account the Modern Awards Objective, comprised of the matters listed at ss.134(1)(a) – 134(1)(h):

(a) relative living standards and the needs of the low paid; and

(aa) the need to improve access to secure work across the economy; and

(ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

16. Section 138 of the Act limits what can be included in modern awards, requiring that a modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the Modern Awards Objective and (to the extent applicable) the minimum wages objective.

17. The Commission's ability to undertake its obligation under s 134 is facilitated by its power to vary awards pursuant to s 157 of the Act. Under that section, the Commission may vary a modern award if it is satisfied that making the determination is necessary to achieve the modern awards objective.[4]There are other important constraints on the power of the Commission with respect to modern awards, however.

18. A modern award must not exclude the NES,[5] but can include terms that are ancillary or incidental to the operation of an entitlement of an employee under the NES or that supplement the NES but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to

[4] See s 157(1) of the Act
[5] See s 55(1) of the Act

the NES.[6]

19. The NES are set by Parliament in Part 2-2 of the Act. The role of the Commission in this Review must be understood in the context of its powers under the Act. As noted at [6] and [7] of the President's Statement on 15 September 2024:

> *The Minister requests that I consider the above matters in the exercise of the Commission's powers.*
>
> *...*
>
> *The review will involve the exercise of the Commission's functions under s 576(2)(aa) of the FW Act and, because the review may ultimately lead to the variation of one or more modern awards, s 157.*

20. The President's Statement notes at [8] that:

> • *The Commission will issue discussion/research papers addressing each of the issues.*
>
> • *Following the publication of the discussion/research papers, interested parties will be invited to lodge submissions. There will also be an opportunity to lodge submissions in reply.*
>
> • *The Commission will then convene conferences to discuss the issues raised in the discussion/research papers and submissions. In accordance with the Commission's normal practice for award-related matters, the conferences will be open to any interested parties and the conference transcripts will be published on the Commission's website.*
>
> • *Following the conferences, a final report will be issued which will conclude the review process. The report might provide recommendations about possible next steps if parties seek variations to modern awards or propose that the Commission take steps on its own motion to vary awards.*

21. A range of relevant principles and observations arise from the above. Firstly, whether or not the Review leads '*directly*' to any variation to modern awards[7], it is clear that the Commission's task in this Review is

[6] See s 55(4) of the Act
[7] See ACTU Submission dated 12 March 2024 at [25]

limited to its powers under the Act. The Commission's consideration of any issues raised for consideration must be placed in a context of what the Commission has the power to do: to vary modern awards in order to satisfy the modern awards objective.

22. The inference contained in the ACTU Submission dated 12 March 2024 is that the Commission's role in this Review is to facilitate discussion between parties before preparing a report which will '*flag to Government*'[8] concerns of parties about a range of matters, including matters beyond the jurisdiction of the Commission. It is not clear whether the ACTU suggests that the Commission provides *recommendations* in its Report however given the ACTU's reference to [8] of the President's Statement of 15 September 2024:

> *It is also clear from the President's Statement that the outcome of the review process will be a final report which "*might provide recommendations about possible next steps if parties seek variations to modern awards or propose that the Commission take steps on its own motion to vary awards.*"*[9]

it appears this could be the case.[10]

23. The ACTU's Submission also contains other references to an apparent interaction between the processes of the Commission and the Government, for example:

> *Recommendation 5 That the Commission invite parties to consider seeking variations to awards to require reporting on individual flexibility agreements, only in the event that the government indicates that it does not intend to legislate to abolish IFAs or require reporting in both awards and enterprise agreements.*

24. For the abundance of caution and to ensure its position is entirely clear, ACCI submits as follows:

    a) It would not be appropriate and would likely be beyond jurisdiction for the Commission to make any recommendation in its Report regarding the sufficiency of the NES to the

[8] See ACTU Submission at [21]
[9] See ACTU Submission at [25]
[10] It is not abundantly clear to ACCI whether this reference is applicable to the 'Work and Care' stream, noting that [10] of the President's Statement of 15 September 2023 is in the context of the modern awards easier to use stream.

Government. This is entirely a matter for Parliament.

b) If parties wish to contest the sufficiency of the NES, this is not a matter to be raised with the Commission for the purpose of '*flagging*' to Government.

c) Although underlying NES conditions are no doubt relevant to the Commission's considerations in this Review (and in many matters before it) it is unlikely to be a productive use of the Commission's time and resources to conduct discussions and/or debates aimed at reaching conclusions about matters which the Commission has no power to change.

d) The focus of the Review (and any report arising from it) should solely be on matters which the Commission has jurisdiction over i.e. variations to modern awards. This will focus the parties' minds on the relevant questions that the Commission can determine; i.e. whether satisfaction of the modern awards objective requires any variation to modern awards.

25. The point at [d] above has significant practical consequences. The role of the Government in creating the NES is relatively unconstrained. By definition, there is no statutory test to introduce a NES condition. This means that, aside from constitutional and political limits, the Parliament may do as it sees fit. There is no statutory 'balancing exercise' to be conducted. By way of contrast, as noted above, the task of the Commission in making and varying modern awards is highly constrained. Critically, s 134 and the modern awards objective requires the creation of a fair and relevant safety net for both employees and employers.

26. Section 138 then conditions the exercise of the Commission's power such that terms may only be included in an award to the extent necessary to achieve the modern awards objective. As noted by the Commission, a distinction must be drawn between '*that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.*'[11]

[11] 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 at [135] – [136].

27. This Review and the Commission's Report arising from it should not focus on what may be 'desirable' from the perspective of a certain party, or for that matter a party's concerns or reservations about the NES. By way of example, the Australian Services Union's submission that '*two days is not enough time to grieve the loss of a loved one*'[12] is obviously correct in a moral sense. The question whether a modern award requires variation to satisfy the modern awards objective on this issue is a different question. It is also not clear what relevance this has to 'Work and Care'.

28. In short, the Commission's consideration in this Review should be constrained by its actual powers to vary modern awards. It may well be that the Review will not directly lead to the consideration or determination of specific award variation applications, however that does not change the position that this is what the Commission is actually empowered to do.

29. Equally, decisions made by Government (such as the abolition of IFAs as referenced by the ACTU in its Submission) may have an effect on the considerations of the Commission however these processes are entirely separate and presumably would not be relevant to the Commission unless and until those decisions are actually made.

[12] See Australian Services Union Submission at [47]

(b) IFAs

30. There is a degree of common ground between the ACTU (and other unions) and ACCI relating to IFAs. Both organisations agree that the current IFA 'regime' is not fit for purpose. Unfortunately, the difference in reasoning for that conclusion is considerable. As we develop in our Primary Submission:

    a) ACCI has proposed a variation concerning Individual Flexibility Agreements in the 'Making Awards Easier to Use' Stream of the Review.

    b) IFA clauses serve a critical purpose. Given the diversity of workplaces (and the range of needs and circumstances of workers), 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. IFAs are designed to provide such a mechanism. They benefit employers and employees who chose to enter into them.

    c) Unfortunately, IFAs are rarely used.

    d) 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.

    e) The lack of 'take-up' of IFAs is particularly relevant to a discussion about 'Work and Care'. If utlised, IFAs could play a meaningful role in facilitating the balancing of work and care arrangements within the modern awards system.

31. By way of contrast, the ACTU and wider union position appears to be that IFAs are being inappropriately used to 'undercut' conditions. Accordingly, the ACTU's submission is that IFAs should either be banned, or *more* heavily regulated. The ACTU's proposal at Recommendation 4 of its Submission is that:

    If Individual Flexibility Arrangements are to be retained in modern awards, the Commission should vary

the standard term for individual flexibility arrangements by:

> *• Relocating the final subclause of the standard term as the first and supplementing it to alert readers to the NES right to request a flexible working arrangement;*
>
> *• Ensuring that an employer's "proposal" for an IFA includes a draft of the IFA;*
>
> *• Ensuring that an employer's "proposal" for an IFA includes a statement to the effect that the employee is free to choose agree or not agree to the proposal; discuss, seek advice or be represented in relation to the proposal; and put forward an alternative;*
>
> *• Ensuring that an employer's "proposal" for an IFA, and any IFA made, states the employer's assessment as to whether the IFA will result in any improvement to the regularity and predictability of the employee's work and income;*
>
> *• Referring to the capacity to bring disputes under the dispute resolution procedure and to the Commission's power to make conciliate, mediate, express an opinion or make a recommendation; and*
>
> *• Providing a capacity for the Commission to review an IFA and express an opinion about whether it continues to meet the BOOT and whether any expectations concerning improvements to regularity and predictability of hours and income had been realised.*

32. Dealing with the proposition that the current IFA arrangements are currently being misused by employers, ACCI is unaware of any compelling data supporting such a claim and further, given the low take-up of these arrangements, ACCI suspects that if any issue did exist, it is not at all widespread.

33. As to the proposal that IFAs be banned, and the contingency contained in the ACTU's recommendation that '*If Individual Flexibility Arrangements are to be retained in modern awards*', we refer to our earlier submissions about the role of the Commission in this Review. The decision to ban IFAs is a matter for Government and should not be a focus of this Review. We would strongly oppose such a decision,

however again, this is not the forum for that debate.

34. A further recommendation of the ACTU, Recommendation 5, appears to actively anticipate a decision of Government on this issue:

> *That the Commission invite parties to consider seeking variations to awards to require reporting on individual flexibility agreements, only in the event that the government indicates that it does not intend to legislate to abolish IFAs or require reporting in both awards and enterprise agreements.*

35. ACCI is not aware of any proposal by Government on this issue. Consistent with our above submissions, the Commission's consideration of this issue should be contained to its consideration of the content of modern awards under the current framework of the Act. ACCI addresses the issues of *varying* the operation of the current IFA regime below.

36. As developed in its Primary Submission, ACCI submits that IFAs have a particular utility in facilitating flexible working arrangements for carers, albeit one that is not being fully realised. From ACCI's perspective, IFA arrangements should be made *more* simple, *more* flexible and *more* available to employers and employees looking to tailor their working conditions to accommodate their particular needs.

37. It is counterintuitive to suggest, as the ACTU Submission infers, that the 'answer' to the current difficulties arising in the system of IFAs is to make the process more complicated, more confined, and subject to further reporting and review. ACCI reasonably speculates that if the ACTU proposals were adopted, use of IFAs would further decrease; a result that will do nothing to facilitate the need to promote flexible modern work practices and the efficient and productive performance of work.[13]

38. Dealing with the components of the ACTU proposal specifically, noting that ACCI has its own proposal for the redrafting of the IFA clause, ACCI is open to considering the 'reordering' of any new clause. The proposal that the clause further elaborate that the employee is 'free to choose' to agree or not agree does

[13] See s 134(1)(d) of the Act.

not appear necessary within the meaning of s 138 of the Act. The proposal that a draft IFA be provided alongside any proposal for an IFA appears to create a level of administrative burden which will further stymie the utility of such clauses.

39. We anticipate that further elaboration is required relating to the proposal that the employer's proposal for an IFA, and any IFA made must state the employer's assessment as to whether the IFA will result in any 'improvement to the regularity and predictability of the employee's work and income'. At present, it is not clear why the improvement to the regularity and predictability of the employee's work and income would be introduced as a further effective 'threshold' for the making of an IFA or the effect of this proposal on the incidence of IFAs. On our current understanding of this proposal, this does not appear necessary within the meaning of s 138 of the Act.

40. References to the Commission's observations in 2013[14] concerning the interaction of "*preferred hours arrangements*" with the Better Off Overall Test are significant to this review, but in ACCI's submission these observations support a more flexible approach to the setting of hours (as proposed in ACCI's Primary Submission) rather than placing further restrictions on the making of IFAs.

41. The additional administrative proposal for an IFA to be 'reviewable' by the Commission including the making of opinions on whether any expectations concerning improvements to regularity and predictability of hours and income had been realised appears to be unnecessary with the meaning of s 138 and will, in ACCI's submission reduce the utility of IFAs.

42. ACCI suspects that creating further compliance risks and processes for IFAs will simply prompt employers to avoid considering entering into IFAs altogether. This will do nothing to balance 'work and care'.

[14] See ACTU Submission at [41] referring to [2013] FWCFB 2170 at [121]-[136]

(c) The correct characterisation of the existing s 65 flexibility regime

43. In light of the union submissions regarding the existing s 65 flexibility regime, a number of observations need to be made in response. Summarising themes arising from the unions' primary materials, ACCI responds as follows.

ACTU: *Awards should be varied to make the right to request flexible work available to all workers*

44. As developed elsewhere in these submissions (and as developed in ACCI's Primary Submission), there are strong merit grounds to avoid the creation of an entirely separate and 'enhanced' NES solely for award workers.

45. Secondly, ACCI notes that this Review concerns 'work and care'. To that point, currently the s 65 regime can be accessed by:

a) employees who are the parent, or have responsibility for the care, of a child who is of school age or younger;

b) employees who are carers (within the meaning of the *Carer Recognition Act 2010*);

c) employees who provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing family and domestic violence.

46. These categories (in addition to the other categories under s 65 - pregnancy, disability, over 55 etc) open the s 65 regime to an incredibly broad range of workers. It may be that there are employees who undertake caring responsibilities who do not fit neatly into the above categories. That would not, in ACCI's submission, warrant the creation of a s 65-like mechanism to all employees regardless of their caring responsibilities which would only apply to award-covered workers. If more carers need to be captured by the s 65 regime, then this can be achieved in other ways.

47. Two other observations arise on this point. Firstly, as noted in s 65A(5)(b)-(c) of the Act, one of the realities of dealing with s 65 requests is that *other employees* may be required to change their working

arrangements to accommodate the request of a person entitled to make a s 65 request. If the s 65 mechanism was replicated into all modern Awards and further was made available to anyone, those categories of employees currently covered by s 65 may well lose their preferential status within the s 65 framework of the Act. This could conceivably have practical effects and give rise to worse results for people who really do *need* flexibility in their working arrangements.

48. The second, more obvious, observation is that regardless of 'coverage' under s 65, there is no prohibition on *asking* for flexible work arrangements; anyone can ask for flexibility, there are simply further processes and protections for certain types of employees. Contrary to the position inferred by the ACTU Submission, employees do not need to wait 12 months before they can ask their employer for flexible arrangements. Indeed, many employees interviewing for roles will actively assert their flexibility requirements including hours they can work and days etc.

49. The enhanced protections under s 65 for certain types of more vulnerable workers is entirely appropriate and is in no sense arbitrary or unfair.[15]

ACTU: *There should also be a collective right for groups of employees to request flexible work and to bring collective disputes regarding flexible work.*

50. This is a matter *perfectly* tailored to be addressed by enterprise bargaining. Creating an ability to bring collective claims and disputes for flexible work outside the enterprise bargaining framework would in ACCI's view actively discourage collective bargaining.[16] This is opposed and is contrary to the modern awards objective.

ACTU: *Allow employees to request flexible working arrangements for reasons relating to their reproductive health*

51. It is not clear that this is an issue within the scope of 'work and care'. This is also a question for the

[15] See ACTU Submission at [58]
[16] See s 134(1)(b) of the Act

drafters of s 65.

ACTU: *Flexible Work Requests are too easily refused by Employers*

52. The ACTU Submission at [50] asserts that: '*A large percentage of requests for access to family friendly working arrangements are refused, either in whole or in part.*' ACCI is not aware of the source of data for this assertion. Even if this were the case, the relevant consideration would be reasonableness of any refusals rather than simply the number of refusals.

53. ACCI notes that at least some of the data relied upon by the ACTU is from a time before the recent changes to the s 65 regime.[17] This is not surprising given the recency of those changes, however it is critical to understand the fundamental change to the effect of s 65 of the Act and the entitlement that it now provides.

54. To understand the newly enhanced entitlement, one must understand the ability of an employer to refuse a flexibility request. The ACTU's submission identifies that the 'reasonable business grounds' on which employers can refuse requests for flexible working arrangements are 'far too broad' and give employers far too many opportunities to refuse requests. A range of observations arise in response.

55. Firstly, at a threshold level, the proposition that '**reasonable** business grounds' are insufficient to warrant the non-acceptance of a flexible work request demonstrates the entirely unbalanced approach to flexibility that the ACTU's position entails.

56. Notwithstanding the ACTU's preference to '*shift the dial*',[18] flexibility and 'flexible modern work practices' need to be mutually practical. It seems counterintuitive and unfair that an employer may have *reasonable* business grounds for making a certain decision but would instead be forced by legislation to make a different decision, presumably on grounds that would be unreasonable from its perspective.

57. Secondly, the ACTU's position simply does not engage with the text of s 65A of the Act.

[17] See for example Professor Jill Murray, Family Friendly Provisions: Report to the Fair Work Commission, 4 May 2017 https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/expert-jill-murray.pdf.
[18] See ACTU Submission at [66]

58. Section s 65A(5) identifies a non-exhaustive list of 'reasonable business grounds' as follows:

> *(a) that the new working arrangements requested would be too costly for the employer;*
>
> *(b) that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested;*
>
> *(c) that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested;*
>
> *(d) that the new working arrangements requested would be likely to result in a significant loss in efficiency or productivity;*
>
> *(e) that the new working arrangements requested would be likely to have a significant negative impact on customer service.*

59. It is apparent from the actual text of s 65A(5) that the threshold for 'reasonable business grounds' is already far higher than might otherwise be the case. By way of illustrative example:

a) it suggests that the new arrangements need to be '***too costly***' not simply result in 'more costs' which might be a 'reasonable business ground' as that phrase is commonly understood.

b) it suggests that there needs to be **no** capacity to change the working arrangements of other employees or that it would be impractical to do so and requires consideration of whether other employees could be recruited.

c) it suggests that there likely needs to be **significant losses** in efficiency or productivity or **significant negative impact** on customer service, rather than simply any loss in efficient or negative impact.

60. ACCI notes that the statutory framework around what constitutes 'reasonable business grounds is

substantively the same as the previous subsection 65(5A)[19] which was introduced by the *Fair Work Amendment Act 2013* (Cth), notwithstanding the abandonment of the previous 'soft' regulatory approach.[20]

61. In addition to the above, given the new ability of employees to review s 65 decisions has yet to result in a material number of claims or cases, it is very difficult to identify a basis for the ACTU's claim that 'reasonable business grounds' provide employers with 'far too many opportunities to refuse requests.'[21] If that were the case, the Commission would likely have heard and determined a good number of successful refusal cases. That has not occurred.

62. Finally, for reasons dealt with in other parts of this submission, the creation of an award system which had a different threshold for flexibility requests (unjustifiable hardship) to all other employees (reasonable business grounds) is entirely unworkable and inappropriate.

63. Notwithstanding a difficultly in discerning the difference between the phrase 'reasonable business grounds' as that phrase is used in the Act and the phrase 'unjustifiable hardship', there is no coherent reason why the award system specifically would employ a different relevant standard.

64. This, as is the case with many of the submissions of the ACTU, is simply a criticism of the NES and should be 'flagged' to Government by the ACTU directly, not through the prism of the Award Review into Work and Care.

65. Finally, further clarification of the ACTU's comments regarding the flexible work system in the UK is warranted. It is our initial understanding that the description of that system in the ACTU's submission is not entirely accurate.

[19] See Explanatory Memorandum to Fair Work Legislation Amendments (Secure Jobs, Better Pay) Bill 2022 [613]
[20] See [2018] FWCFB 1692 at [406]
[21] See ACTU Submission at [64]

(d) The Union criticism of the NES

66. The submissions of the ACTU and various unions make a number of generalised complaints about the adequacy of the NES. Four weeks of annual leave is described as '*not a lot of time*'.[22] More leave is requested, at higher rates of pay. Personal/Carer's leave is proposed to be doubled, again at higher rates.[23] The flexibility request regime is proposed to apply universally, with a higher threshold for refusal.[24]

67. As developed earlier in these submissions, the conduct of this Review should be guided by powers of the Commission and its task to ensure that modern awards satisfy the modern awards objective. If a party's real concern is the adequacy of the NES, this is a matter for Parliament to consider, not the Commission. As above, it is not the role of the Commission to 'flag to Government' issues of the parties or to advise the Government either way with respect to the NES.

68. ACCI of course appreciates that modern awards *can* contain conditions which supplement the NES. However, as developed in our primary submission, it not apparent to ACCI why an NES entitlement would need to be specifically varied for award-covered employees in the context of this Review. ACCI submits, as a matter of principle, that entitlements directed at addressing 'universal' employee needs are more appropriately addressed within the NES. Modern Awards more readily lend themselves to addressing industry specific matters or matters which at least apply more specifically to award-covered workers.

69. The creation of an 'enhanced' set of NES standards solely for award covered workers is not conducive to a simple and easy to understand award system, nor does it seem fair. There are also fundamental practical problems with providing enhanced NES protections solely for award-covered employees over award free employees. What would be the coherent rationale for an award covered employee, perhaps covered by an industry award, to have considerably more leave and flexibility entitlements than a person with the same role not covered by a modern award? Where award coverage was disputed, entitlements to additional leave and flexibility entitlements will give rise to considerable disputation.

[22] See ACTU Submissions at [129]
[23] See ACTU Submissions at [140]
[24] See ACTU Submissions from [56]

70. There is also the more fundamental difficulty that the Commission's jurisdiction with respect to modern awards would require it to assess whether, for any particular modern award, the modern awards objective requires the alteration of the existing safety net. It seems unlikely in the extreme that a step as significant as doubling personal/carers leave, increasing annual leave by 25% or 're-writing' s 65 solely for award-covered employees could be necessary for *all* employees under *all* awards.

(e) Working from Home

71. The ACTU Submission suggests modern awards should be varied to provide workers with the right to request work from home arrangements on an individual and collective basis, with access to dispute resolution by the Commission, and the same requirements for employers in terms of responding to the request and the information they need to provide to employees as a flexible working request. The ACTU submit the right should be available to all workers, regardless of their length of service or reason for requesting WFH arrangements. The ACTU submit that employers should only be permitted to refuse a request on reasonable grounds and that there should be clear, objective and industry-specific criteria in each relevant award to determine the reasonableness of a refusal. This is opposed by ACCI.

72. Working from home is dealt with in our Primary Submission. ACCI does not support the introduction of any general enshrined 'right to work from home' in the context of modern awards. Absent any other prevailing obligations or entitlements, the principle of managerial prerogative requires that any decision to allow, facilitate or to direct workers to undertake work from home must ultimately be made by (or at least with the agreement of) employers.

73. From ACCI's perspective, it is not appropriate to include industry wide 'rights' to work from home in modern awards. Such terms can be negotiated through enterprise bargaining or can (as is evident) arise organically at individual workplaces or in certain industries.

74. In the context of 'work and care' ACCI notes that existing s 65 flexibility requests can be utilised to seek work from home arrangements. To the extent that WFH is necessary for those with caring responsibilities, those workers have the right to request working from home arrangements under the NES.

75. In answer to the ACTU's proposal:

    a) ACCI's position is that any employee can ask for working from home arrangements (and many do when commencing employment).

    b) For the reasons developed above, employees covered by s 65 of the Act have a more

'robust' right to ask for working from home arrangements and this disparity is not arbitrary.

c) Employees can already collectively negotiate working from home arrangements through enterprise bargaining.

d) Placing a 'reasonable grounds' standard on an employer's ability to run its business is not inappropriate and inconsistent with the modern awards objective.

e) The creation of a 'right to work from home' purely for award-covered workers is entirely impractical and may lead to absurd and arbitrary results (e.g. the award-covered administrative staff of an organisation working from home while the award-free managers or others worked from the office).

f) Given the recency of widespread 'working from home' arrangements (i.e. less than 5 years), it is not in any sense clear that 'working from home' is or should be a 'right'.

(f) The Variation of Award-specific Conditions on the basis of Gender Equality

76. The Discussion Paper also poses questions concerning aspects *specific* to modern awards (as opposed to the NES), such as:

a) Span of hours;

b) Overtime;

c) Toil;

d) On-call and recall; and

e) Travel time.

77. The format of the ACTU's (and other unions) submissions and proposals on these issues take a fairly consistent form:[25]

a) Firstly, an identification that entitlements between awards covering 'male dominated' industries and those covering 'female dominated' industries are different;

b) Secondly, an assertion that, as a general trend, workers in 'female dominated' industries are worse off;

c) Thirdly, the conclusion that as such, all 'female dominated' awards should be raised to the 'high-water' mark of the male-dominated awards with respect to each specific award condition.

78. As an initial observation in the context of 'Work and Care', it is curious that the ACTU do not appear to engage with the proposition that 'female dominated' industries may in fact be so because work in those industries is more amenable to a balance between work and care. It certainly seems counterintuitive to suggest that the conditions of 'male-dominated' industries are

[25] See by way of example ACTU Submissions at [89]-[90] which references the SDA submissions, see ACTU Submission at from [106], from [116], from [120]

more suited to balancing work and care than 'female-dominated' industries[26] and that 'female-dominated' industries should be industrially reformed to resemble male-dominated ones to facilitate the care responsibilities of women. Regardless, no analysis is undertaken as to why award conditions might be different under different awards.

79. In the event that the unions' submissions give rise to substantive industrial claims, considerably more analysis would need to be undertaken to assess the appropriateness of any award change. ACCI notes however that it should be entirely unsurprising that different modern awards provide for different standards and conditions.

80. ACCI is particularly cognisant of the considerable proposals made by the union parties with respect to the restriction of part-time employment. These claims (or observations supporting them) have also been made in the 'Job Security' stream of the Review. As noted by one of our members in that stream,[27] while some strictures on part-time engagements are relevant for setting the minimum safety net, a balance must be struck that does not compromise (or neglect) the operation of such clauses in a flexible and practical manner (consistent with s 134(1)(d), (f) and (h)) as the safety net is for both the employer and employee.

81. As noted by the Fair Work Commission in Casual Employment and Part-Time Employment (2017) 269 IR 125; [2017] FWCFB 3541, the:

> *degree of regularity and certainty in working hours for part-time employees needs to bear a proper relationship to the patterns of work in the industry sector in question. While there are many sectors with predictable patterns of hours which make the conventional model of part-time employment entirely workable, that is clearly not the case in the hospitality and clubs sectors.*

82. As to the construction of part-time provisions, in that context, the Full Bench in that case observed

[26] See ACTU Submissions at [7]
[27] Submission of Business NSW and Australian Business Industrial in the 'Job Security' Stream dated 21 February from [77]

that a more flexible part-time provision can lead to a very large increase in the proportion of part-time employees (and a corresponding drop in the proportion of casuals).[28] ACCI submits that the converse is also true, that an overly restrictive part-time provision will simply incentivise casual employment to the detriment of part-time employment.[29]

83. To that end, considerable thought needs to be put into the industry-specific nature of any award claims. The mere existence of disparities between award conditions does not give rise to unfairness or arbitrariness per se.

84. The Commission would need to make an assessment of why there is a disparity, and it if warrants correction, apply the framework of the Act (for instance, assessment of the modern awards objective and/or reliance on 'work value' grounds) to correct it.

85. Statements such as those contained in the Australian Services Union Submission that: 'the modern awards system does not value the time of employees working in industries dominated by women'[30] do not adequately engage with the complexity of the issue of work and care.

86. Taking span of hours clauses as an example, ACCI suggests that there may be a range of reasons why some industries have a broader span of hours than others, most likely to do with client/customer demand and relevant service periods. It cannot be simply asserted that disparities in awards are caused by prejudices and assumptions around gender. In setting a fair and relevant safety net, the modern awards objective requires the Commission to strike an appropriate balance between the perspectives of employees and employers,[31] not simply to implement a preferred employee standard or one aimed simply at standardisation of entitlements.

87. ACCI appreciates that changes to the modern awards objective and to the objective of the Act warrants further consideration of the issue of gender equality and the undervaluation of work on

[28] [2017] FWCFB 3541 at [525]
[29] As was the case for the 'dead-letter' part-time provisions *in the Hospitality and Clubs sectors in* 2017] FWCFB 3541 see [524]
[30] See Submissions of Australian Services Union at [27]
[31] 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 at [37]. See also the Paper at [21].

the grounds of gender.

88. That, in ACCI's submission, would not require the Commission to simply (and arbitrarily) 'correct' any modern award condition where there was any difference between a 'male dominated award' and a 'female dominated award'.

89. As previously submitted, no particular primacy is to be attached to any of the factors listed in s.134(1) of the Act, which amount to competing considerations that need to be balanced.[32] Accordingly, it should not be controversial that application of the modern awards objective may result in different outcomes between different modern awards.[33]

90. Finally, ACCI stresses that the Work and Care Review is not simply an exercise in addressing gender equity in modern awards. It should be aimed at providing practical solutions that directly facilitate the balance of work and care for workers with caring responsibilities in the Australian award system. The proposals put forward by the ACTU and the unions largely do not engage with the central equity issue in the context of 'work and care'. Greater equality will be achieved when there is a more equal distribution of caring responsibilities between men and women. This will require the facilitation (and effective incentivisation) of men to undertake more caring, and as a result less paid work. Equally, a more equitable distribution of caring will result in women performing more paid work and less care work. This (at least in part) would contribute to an award system where there is more equal distribution of men and women across all awards. This end is unlikely to be achieved simply by mandating uniform award conditions across all awards. The Commission should be cognisant of this in conducting its review.

[32] 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 at [115] and [163]. See also the Paper at [22].
[33] 4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [60].

(g) ACCI Summary Comments on Recommendations

91. The nature of the unions' submissions and the context of the Review does not allow a comprehensive response to all recommendations and claims of all parties. Many of the ACTU's (and other unions) recommendations are addressed above. In addition to our above submissions, ACCI uses this opportunity to make the following observations however.

ACTU Recommendation 1 *– That this review encompasses all awards*

92. It is not clear to ACCI that the Review is limited to 25 Awards. It is certainly the case that the Commission has jurisdiction over all awards. ACCI understands that the Commission does not intend on pursuing any 'open-ended reconsideration of the terms of modern awards' and will take a 'confined' approach.[34]

ACTU Recommendation 2

93. Security of patterns of works, guarantees of minimum hours and payment for additional hours in modern awards are award-specific matters. ACCI does not support a 'one-size-fits all approach and the introduction of rigidities and penalties which may be entirely unsuited to the conditions of a particular modern award. Any assessment of this recommendation would need to be considered against the modern awards objective in the context of a particular award.

ACTU Recommendation 8 *– Awards should be varied to allow workers with caring responsibilities to revert back to their former working hours following a period of part time or reduced hours of work.*

94. ACCI does not see any current prohibition on an employee and employer being able to reasonably agree to such an accommodation through a s 65 request. Obviously, any reversion back to former working hours would need to be contingent on the existence of those hours.

ACTU Recommendation 9 *– Facilitative Provisions*

[34] See ACTU Submissions at [10]

95. ACCI is unaware of any existing difficulties with facilitative provisions. As with the use of IFAs, the imposition of additional administrative and practical constraints on the use of facilitative provisions (such as the proposal for mandatory union negotiations before use) will simply reduce the use and utility of facilitative provisions. This will do nothing to balance 'work and care'.

ACTU Recommendation 11 *– Minimum Engagements*

96. The claim for a universal four hour minimum engagement was the subject of an ACTU claim in the 4 Yearly Review - AM2014/196 and AM2014/197. In summarising its rejection of that claim, the Full Bench's summary of Decision 5 July 2017 stated at [13]:

> *We are not satisfied that the modern awards objective requires the grant of the other two elements of the ACTU claim. In relation to the claim for a standard daily minimum engagement period of 4 hours for casual and part-time employees in each modern award, while that might in some awards represent an appropriate balancing of the competing considerations which arise in respect of minimum engagement periods, we do not consider that it can be adopted on the across-the-board basis proposed by the ACTU. It would not meet the modern awards objective in all awards because we consider that it might have the counter-productive result of reducing workforce participation and social inclusion and might also in some awards inhibit flexible modern work practices and the efficient and productive performance of work.*

97. ACCI would endorse that view here.

ACTU Recommendation 12 *– Spans of hours*

98. While we address this above, we again stress than spans of hours and penalty rates etc are entirely unsuitable for global 'one-size-fits all' analysis. Any particular condition in any particular award would need to be assessed against the modern award objective and the safety net developed would need to take into account fairness for both employees and employers.

99. At [52] of its submission, the ACTU submit that it is possible for work to be both flexible and

secure, calling in support the Senate Report for this proposition. Unfortunately, the Senate Report does not particularly elaborate on the 'large and small' employers managing to achieve this balance save for Aldi, who in engaging part-timers on flexible hours contracts, appears to engage in conduct which might not be possible under the ACTU proposals (the working of additional part-time hours without penalty).[35]

100. This would also apply to the ACTU's recommendations regarding guarantees of hours and the payment of overtime on all additional hours (Recommendations 15 and 16).

ACTU Recommendation 13 *– 28 Day Roster Notification*

101. Rostering rules are highly award specific. A universal 28 notification entitlement would be entirely unworkable in many awards.

ACTU Recommendation 17 *– TOIL*

102. TOIL was subject to a considerable 4 Yearly Review case in (AM2014/300). TOIL is subject to an ACCI specific claim in the 'Making Awards Easier to Use' stream. We rely on our submissions in that stream.

ACTU Recommendation 18 *– The Commission include in its report a recommendation that there be a review of standard working hours, the extent, and consequences of longer hours of work, stronger penalties for longer hours, and ways to effectively reduce working hours.*

103. It is not clear to ACCI on what basis the Commission would be providing a recommendation (or to who). Further, it is not clear that the reduction in working hours should be a goal or objective of the Commission. This is not a feature of the Act.

ACTU Recommendation 21 *– Awards should be varied so that when employees take annual leave, they get their ordinary hourly rate (including any penalties) plus a 17.5% annual leave loading.*

[35] See Select Committee on Work and Care Final Report at [6.62].

104. ACCI does not support this proposal nor is it apparent how or why it is relevant to 'work and care'.

105. The ACTU submits at [130] that "*Payment during paid leave should not fall below reasonable expectations of take home pay over the same period."* The proposal for 17.5% and penalties appears to be in excess of this. The ACTU also notes at [128] that the payment of leave at base rates "*devalues time taken away from work to attend to caring responsibilities*". Again, this demonstrates the conflation in the ACTU's submissions around work and care. For the purposes of the Act, care is not work. The Commission has no role in valuing non-work time (or 'compensating' employees for it).

(g) Literature Review

106. On 24 November 2023, the President of the Commission announced that a literature review would be conducted by the Western Sydney University, to analyse existing literature on modern awards and their impact on employees' work and care responsibilities (Literature Review).

107. On 8 March 2024, Deputy President O'Neill issued a statement publishing the Literature Review. The aims of the Literature Review were threefold, namely to:

> *Analyse existing literature on modern awards and National Employment Standards (NES) framework in the Fair Work Act 2009 (Cth) (FW Act) and their impact on employees' work and care responsibilities;*
>
> *Identify and synthesise the key findings, trends, and emerging themes in the field; and*
>
> *Analyse existing literature to highlight various factors influencing the relationships between these workplace relations settings and employees' ability to balance their work and care responsibilities.*

108. The Literature Review is incredibly broad and addresses an incredibly complex aspect of our industrial relations system and our broader society. In all fairness, in the time allowed it is simply not possible to respond comprehensively to the matters addressed in it, and ACCI notes that the initial timetable of the Commission in this Review did not appear to anticipate parties making written submissions on it.

109. The relevance and utility of the Literature Review, and ACCI's response to it, may well need to be determined following the finalisation of what the Commission and the parties intend to achieve with the Work and Care Review. At this stage, ACCI's submissions on the Literature Review are as follows.

110. The Literature Review includes approximately 21 proposals which would amend the NES in order to improve the balance between work and care for employees in Australia (**Literature Review**

Proposals). ACCI submits that, given the Literature Review Proposals concern recommendations about the NES, there are limits as to their relevance in the context of a review of modern awards.

111. The Literature Review, for the most part, presents concepts and ideas proposed by scholars and employee focused organisations aimed at improving the 'safety net' of society in regard to work and care responsibilities. While this corresponds with the aims of the Literature Review, the Literature Review fails to discuss, and gives very little consideration to, the perspectives of employers and whether the Proposals and ideas advanced in the Literature Review would be practicable, or feasible, for businesses.

112. Unsurprisingly, the Literature Review fails to place sufficient weight on what is possible for employers and businesses, it does not take into account the realities, and the limitations, of what can reasonably be done by employers to address concerns about the balance of work and care in Australia. Any assessment of changes to modern awards would need to be assessed against the modern awards objective which, as referred to several times above, requires fairness for both employees and employers.

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ACCI strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth, and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education, and training.

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