



Modern Award Review 2023-2024

ACTU Submission in Response – “Making Awards Easier to Use” stream

ACTU Submission, 19 February 2024
ACTU D. No 13/2024

Contents

Introduction	1
Scope of Review.....	1
Ease of Use and Reduction	2
Guidance?	3
Other Awards.....	3
Applications.....	3
Approach to Conferences.....	4
Attachment A.....	5

Introduction

1. The FWC is reviewing modern awards, as set out in the President’s statement of 15 September 2023 (Review).¹
2. The ACTU makes the following submissions in response to submissions made in the “Making Awards Easier to Use” stream, pursuant to the timetable set out in the Full Bench’s statement of 4 October 2024.²

Scope of Review

3. The Review follows correspondence from the Minister for Employment and Workplace Relations to the President. In that correspondence:³

‘The Minister further states that he considers it critically important that the modern award system be easy to understand, stable, and sustainable, and encourages the use of the proposed review to identify what parties believe could be done to make awards easier to use. The Minister also notes the Government’s view that the review should not result in any reduction in entitlements for award-covered employees.’

4. Two aspects of the President’s statement are re-iterated in the Full Bench’s Statement of 17 January 2024 on the part of the Review concerned with making awards easier to use:⁴
 - a. ‘the consideration in the review of [ease of use] will not involve any open-ended reconsideration of the terms of modern awards’ and
 - b. ‘Parties will be invited to advance any proposal to make modern awards easier to use while not reducing entitlements for award-covered employees.’
5. The Full Bench’s Statement identifies two submissions which either fall outside of the scope of this part of the Review or do not comply with the direction to file proposals/draft determinations.⁵
6. We note that modern awards are relatively recently formed and have been the subject of extensive reviews both as part of the former 4-yearly review process and by way of separate applications. We are of the view that matters considered at length during those processes should not be re-ventilated here.

¹<https://www.fwc.gov.au/documents/resources/presidents-statement-modern-awards-review-2023-24-2023-09-15.pdf>

² [2023] FWCFB 179

³ President’s Statement at [4]

⁴ [2024] FWCFB 6 at [1], emphasis in original

⁵ [2024] FWCFB 6 at [5] – [7]

Ease of Use and Reduction

7. Many submissions to this scheme appear to make the underlying argument that reducing or removing rights and entitlements in modern awards would make them easier to use. This proposition should not be accepted as the basis for ease of use.
8. The reduction of entitlements contained in a number of proposals are, in the ACTU's submission:
 - a. Beyond the FWC's scope for the review, and inconsistent with the terms on which the FWC called for proposals; and,
 - b. should not be countenanced in this review, noting that it is open to any party to advance applications outside of the Review.
9. Not only do some of the parties put general or specific proposals which reduce entitlements, some parties unabashedly call for the already clearly defined scope of the review to be re-fashioned to allow for this:
 - a. From paragraph 15 of their submission, the Ai Group say that the review should not be "constrained" by seeking to avoid reductions of entitlements for award-covered employees; and
 - b. At 5.22 to 5.25 of its submission, Business NSW effectively advances a proposition that the FWC *must* vary modern awards despite the set terms of the Review;
10. ACCI, from paragraph 1.8 of its submission seeks to distinguish between substantive rights and procedural rights. Their attempt to diminish the significance of the latter should not be accepted. Procedural rights – whether the right to a fair trial, the right to a support person or a right to have an outcome recorded in writing – are all vitally important in themselves as well as safeguards for the exercise of substantive rights.
11. It is a significant thing to reduce the rights and entitlements owing to an individual. This is particularly the case where each term of a modern award has been the subject of a detailed process of formation and extensive subsequent review. We are of the view that the FWC should not approach a finding that removal of such rights is necessary to achieve the modern award objective without (at least):
 - a. A separate application;
 - b. Evidence put by the Applicant as to the history and rationale of initially including the term in the modern award;
 - c. Evidence and submissions put by the Applicant as to why removal or modification of a term inserted out of necessity to achieve the modern awards objective should now be removed in order to achieve the modern award objective.
12. This is not to say that ease of use cannot be achieved – merely that it should not come at the cost of workers' rights. Rather, ease of use should be delivered in a way that does not reduce conditions.
13. A similar approach to achieving this balance was adopted in the plain language drafting of modern awards, through guideline 2.2:

The aim of plain language drafting is to make an award as simple and easy to understand as possible, without taking away from precision or omitting necessary information or unintentionally changing the legal effect of the award.

14. At any rate, the parameters of this review are set out more clearly – the Review is directed towards proposals that improve ease of use but do not reduce entitlements. This is not the forum to re-litigate proposed cuts from the past or to explore new and innovative ways in which to strip entitlements.
15. Appendix A to this submission sets out a number of proposals advanced in submissions to the Review, which the ACTU and its affiliates view as being outside of the stated confines of this review.

Guidance?

16. ACCI, from paragraph 1.16 of their submission argue that (at 1.18) '[modern awards] are not guidance documents, nor are they designed to be comprehensive statements of the terms and conditions afforded to employees'.
17. We simply note the divergence of views on this point, including amongst those representing employer interests:
 - a. Throughout its submission, the Australian Workforce Compliance Council calls for there to be guidance material in modern awards;
 - b. Throughout its submission, Master Grocers Australia calls for the inclusion of explanatory and associated material;
 - c. In its submission, at paragraph 9.4, ACCI calls for the inclusion of guidance material, templates and examples in modern awards.

Other Awards

18. We raise one further point of concern, relating to the application of any findings of the review beyond the modern awards that are the explicit focus of this stream.
19. We note that a number of parties advance proposals that are put forward as, or could be, of application beyond the specifically named awards the subject of this Review stream.
20. In our submission, any findings or outcomes made as a result of this stream of the Review should carry with them a caveat that their application is confined to the awards explicitly within scope. This is particularly so given that a number of parties interested in awards outside of this Review stream are not making submissions as part of this stream.

Applications

21. One matter which does contribute to a lack of ease of use for modern awards is the great number of applications to vary awards brought by persons representing few or no participants in the relevant industry,

22. This means that representative or more representative industrial participants are required to participate in award reviews brought by parties with narrow interests – in order to ensure that broader interests are represented. This results in a significant expenditure of limited resources for those parties as well as those of the FWC itself. It has also impacted on the content that ultimately goes into modern awards.
23. A better solution going forward would be to ensure that only those parties which are sufficiently representative are capable of bringing applications for award variations. This could be achieved through the return of party status to modern awards. Enabling such parties to focus limited resources on such applications to vary awards improves the ease of use of the modern awards system as a whole.
24. While we note that this would require legislative change, we ask the FWC investigate the extent of this issue to better inform any future law reform, and to note the ACTU's position on this matter in its final report for this review.

Approach to Conferences

25. The ACTU and its affiliates are of the view that there is no merit in further exploring the proposals included in [Attachment A](#) as part of this Review, but are willing to participate fully in the consultation process with respect to other proposals.
26. ACTU affiliates will identify those proposals on which, in their view, productive discussions may be had during this Review in their written submissions and during the conference process.

Attachment A

Proposal	Award	Proposer	Note
Allow split shifts where employees volunteer	Children's Services 13.6(a) Clerks (21.2)	ABI	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use
Add the following to the classification clause: "The classification by the employer must be based on the characteristics that the employer requires the employee to have, the skills that the employer requires the employee to exercise, in order to carry out the principal functions of employment."	Hospitality(14) Retail (14) SCHADS (13.2) Children's Services (13.1)	ABI	<ul style="list-style-type: none"> • Reduction
Add exemption rates for employees at level 3+.	Clerks (New)	ABI	<ul style="list-style-type: none"> • Reduction • Note: separate application filed)
Changes to Superannuation Award PN 2.22 Purpose of Mod Awards is not to be general guidance documents PN 2.38 remove paid leave reference	Retail SCHADS Hospitality Fast Food Retail Children's Services Clerks	ACCI	<ul style="list-style-type: none"> • Previously determined
Strip back TOIL clauses to remove:	Clerks Children's Services		<ul style="list-style-type: none"> • Reduction • Beyond Ease of use

<ul style="list-style-type: none"> - Requirements for separate agreements for each period of overtime - Content requirements for TOIL agreements - Extend time to 12 months - Remove example agreement from Schedule - Convert time to pay to “as soon a practicable” rather than next pay period. - Remove specification of linkage to s. 65 requests. 	<p>Hospitality SCHADS Fast Food Retail Retail</p>		
<p>Annualised Salaries:</p> <ul style="list-style-type: none"> - Remove requirement to detail how calculated - Remove requirement to detail outer limit of hours that are compensated - Remove requirement to pay hours beyond the outer limit - Remove requirement that annual salary be no less than what would otherwise have been paid over the year - Remove requirement to keep records - Remove 14 day period to pay compensation after reconciliation 	<p>Clerks</p>	<p>ACCI</p>	<ul style="list-style-type: none"> • Reduction
<p>Annualised salaries:- - Remove requirement for employee agreement</p> <ul style="list-style-type: none"> - Remove exclusions from classes of employees eligible to make an arrangement - Remove requirement for 25% premium - Remove outer limits on hours 	<p>Retail Hospitality</p>	<p>ACCI</p>	<ul style="list-style-type: none"> • Reduction

<ul style="list-style-type: none"> - Remove requirement to provide information to employees - Remove requirement to pay hours beyond the outer limit - Remove requirement that annual salary be no less than what would otherwise have been paid over the year - Remove requirement to keep records - Remove 14 day period to pay compensation after reconciliation 			
<p>Excessive leave</p> <ul style="list-style-type: none"> - Remove employee rights to give notice of taking excessive leave - Allow employers to direct period of leave of less than one week - Disregard other planned leave when maintaining the 6 weeks in reserve - Remove 12 month outer limit. 	<p>Retail SCHADS Hospitality Fast Food Retail Children's Services Clerks</p>	<p>ACCI (supported by ABI)</p>	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use
<p>Consultation</p> <ul style="list-style-type: none"> - Amalgamate major change and hours of work consultation provisions - Replace requirements to consult with requirement to invite to discuss - Remove requirements for change of hours consultation to happen before the change takes place 	<p>Retail SCHADS Hospitality Fast Food Retail Children's Services Clerks</p>	<p>ACCI (supported by ABI)</p>	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use

IFAs – convert the BOOT to the NDT + employee preference	Retail SCHADS Hospitality Fast Food Retail Children’s Services Clerks	ACCI	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use
Re-draft minimum engagement provision Shorten the minimum engagement	Clerks Retail SCHADS Fast Food	AiG	<ul style="list-style-type: none"> • Reduction
Extend option to agree to monthly pay to also include 4 weekly, remove obligation to pay 2 weeks in advance and 2 weeks in arrears. PN77	Clerks Retail SCHADS Fast Food	AiG	<ul style="list-style-type: none"> • Reduction
Provide a default 17.5% leave loading where the number of hours that would attract penalties is not known. PN108	Clerks Fast Food Retail SCHADS	AiG	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use

Part time hours agreements can be by electronic means	Clerks Fast Food SCHADS Children's Services	Ai Group	<ul style="list-style-type: none"> • reduction
Changes to part time hours agreements can be by electronic means	Clerks SCHADS	AIG	<ul style="list-style-type: none"> • Reduction
Extend spread of ordinary hours to 7AM-7PM, 7 days a week.	Clerks	Ai Group	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use
Allow employees to agree to work 6 hours without a meal break.	Clerks Fast Food Retail	Ai Group	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use
Exemption rates for level 5, with a 15% premium	Clerks	Ai Group	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use
No minimum 3hrs O/T for return to duty if work is performed at a location that is not a designated workplace.	Clerks	Ai Group	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use
Minimum engagement doesn't apply to meetings or training not held at a designated workplace.	Fast Food Children's Services	Ai Group	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use
Minimum engagement can be reduced by agreement.	Fast Food Retail SCHADS Children's Services	Ai Group	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use

Add monthly and 4 weekly pay periods	Fast Food Retail SCHADS Children's Services	Ai Group	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use
Pay averaging over pay period, but only in respect of ordinary hours.	Fast Food Retail SCHADS Children's Services	Ai Group	<ul style="list-style-type: none"> • Reduction
Remove break times specification form part time work agreements	Fast Food Retail	Ai Group	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use
Allow PT to agree to work overtime outside of agreement without the payment of overtime rates.	Fast Food Retail	Ai Group	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use
Allow employees to agree to split shifts	Fast Food	Ai Group	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use
Allow employees to agree to combine rest breaks and meal breaks	Fast Food Retail SCHADS	Ai Group	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use
Allow employees to agree to take rest breaks or meal breaks within the first or least hour of work	Fast Food Retail	Ai Group	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use
Employer right to direct work to be preformed during breaks, and only "endeavour to provide"	Fast Food	Ai Group	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use

an alternate break “as soon as reasonably practicable thereafter”.			
Introduce annualised wages for PT and FT, may be imposed unilaterally by employer.	Fast Food Retail SCHADS	Ai Group	<ul style="list-style-type: none"> • Reduction
Extend ordinary hours to 11PM if the “retailer” (rather than the establishment) trades beyond 9M-F or 6W. (so all retailers with an online presence have ordinary hours till 11PM, even if the physical stores are closed)	Retail	Ai Group	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use
Introduce exemption rates for level 4+ PT & FT	Retail	Ai Group	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use
Allow employer to constantly revoke/reinstate first aid duty to prevent the payment of continuous first aid allowances.	Retail	Ai Group	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use
Remove transitional broke shift provisions	SCHADS	Ai Group	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use
Written notice of deferred progression can be by electronic means	Children’s Services	Ai Group	<ul style="list-style-type: none"> •
Employer can give less than 7 days notice of change of roster where this is due to another employee’s unexpected absence, and the change will not attract overtime.	Children’s Services	Ai Group	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use

Essentially abolish entitlements to meal breaks for OSCH during school holidays.	Children's Services	Ai Group	<ul style="list-style-type: none"> • Reduction • Beyond Ease of use
Include a summary of all circumstances in which entitlement may become payable, even where this arises as a result of combination of different clauses.	Retail	MGA	<ul style="list-style-type: none"> • Reduction (if complete)
Include a note in clause 15 setting out when ordinary versus overtime rates are payable	Retail	MGA	<ul style="list-style-type: none"> • Reduction (if complete)
Include note and cross reference to the higher duties clause in Schedule A – classifications.	Retail	MGA	<ul style="list-style-type: none"> • Should be note, not exhaustive, could be explanatory materials instead.
Vary the special clothing allowance clause to include examples of what is special clothing and specify what isn't.	Retail	MGA	<ul style="list-style-type: none"> • Reduction (if complete)
Clarify the cold work allowance to define when an employee is "principally employed on any day" to do the relevant work.	Retail	MGA	<ul style="list-style-type: none"> • Reduction
Insert a note to clause 19.11 that clarifies that recall allowance is not payable where roster is changed by agreement under under 10.6 [PT changes to regular pattern of work] or 15.9(e) [changes rosters for employees other than part time]	Retail	MGA	<ul style="list-style-type: none"> • Reduction

Vary clause 25.4 so that work done either side of sleepover is ordinary hours and the sleepover counts as a break.	SCHADS	WACCI	<ul style="list-style-type: none"> • Reduction (+ already subject to an application)
Vary clause 27.1 so that where an employee is required to be present and awake with a client overnight and there is time to take a break they can be paid for that meal period and not get a break.	SCHADS	WACCI	<ul style="list-style-type: none"> • outside scope
Vary clause 10.3 re part time hours – purpose unclear.	SCHADS	WACCI	<ul style="list-style-type: none"> • Reduction
Vary clause 25.4 to reduce break times between shifts to 8 hours.	SCHADS	WACCI	<ul style="list-style-type: none"> • Outside scope and possible reduction
Vary clause 31.5 to remove the cap on the number of weeks of leave that may be cashed out.	SCHADS	WACCI	<ul style="list-style-type: none"> • Outside scope and possible reduction
Vary clause 25.10(c)(i)(D) to remove 1 hour minimum payment.	SCHADS	WACCI	<ul style="list-style-type: none"> • Outside scope and possible reduction
Vary clause 28.2 to extend the TOIL period/payout period from 3 months to 12 months.	SCHADS	WACCI	<ul style="list-style-type: none"> • Reduction • out of scope
17)IFAs (cl 5) language to be simplified	Fast Food	AWCC	<ul style="list-style-type: none"> • Reduction
Clause 1 – title – should be more inclusive	SCHADS	AWCC	<ul style="list-style-type: none"> • Doesn't comply w directions

CI 2 – application and operation – may benefit from simplification	SCHADS	AWCC	<ul style="list-style-type: none"> • as above
CI 3 – defn casual – not clear	SCHADS	AWCC	<ul style="list-style-type: none"> • As above
CI 7.6 - application and operation – could be simplified	SCHADS	AWCC	<ul style="list-style-type: none"> • As above
CI 7.1 + 7.4 - IFAs – simply language and provide guidance	SCHADS	AWCC	<ul style="list-style-type: none"> • As above
CI 7.3 - IFAs should be able to be made prior to commencing employment	SCHADS	AWCC	<ul style="list-style-type: none"> • reduction
20.2(b) clothing an equipment – allowance should be paid per day not shift	SCHADS	AWCC	<ul style="list-style-type: none"> • reduction
20.5(c) meal allowance – remove ability for e/ee to request payment on same day overtime worked	SCHADS	AWCC	<ul style="list-style-type: none"> • reduction
25.1 - ordinary hours –remove ‘by agreement’ requirement	SCHADS	AWCC	<ul style="list-style-type: none"> • Reduction (safeguard)
CI 3 – definition of SACS sector – could be clarified	SCHADS	AWCC	<ul style="list-style-type: none"> • Doesn’t comply with directions
CI 4.8 - coverage – language could be simplified	SCHADS	AWCC	<ul style="list-style-type: none"> • As above
CI 5 + 6 – NES and Award – could be clarified and guidance provided	SCHADS	AWCC	<ul style="list-style-type: none"> • As above
8.1 - consultation re major change	SCHADS	AWCC	<ul style="list-style-type: none"> • As above

25.7 - sleepovers	SCHADS	AWCC	<ul style="list-style-type: none">• Outside scope
25.4 rest breaks – too complex	SCHADS	AWCC	<ul style="list-style-type: none">• Reduction

address

ACTU
Level 4 / 365 Queen Street
Melbourne VIC 3000

phone

1300 486 466

web

actu.org.au
australianunions.org.au