



Modern Awards Review 2023-24 (AM2023/21)

Submission cover sheet

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Modern Awards Review 2023-24

Submission by the Australian Council of Trade Unions in reply to
Job Security submissions

ACTU Submission, 21 February 2024
ACTU D. No 12/2024

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Avoiding (re)construction

1. As set out in our initial submission, this review is properly concerned with how the modern award system should respond to the amended object of the FW Act set out in s. 3(a) (“..promote job security..”) and the amended modern award objective set out in section 134(1)(aa) (“..the need to improve access to secure work across the economy..”).
2. During the mention & directions hearing on 6 February, we noted that the proper construction of the amended provisions had been settled by the Commission and that there seemed to be no utility in reconsidering that authority, particularly in circumstances where the output of this review was to be a “report” rather than a decision or determination in the conventional sense. We note in this respect that the review is being conducted under s. 576(2)(aa) of the FW Act¹, which grants the Commission a function of “promoting cooperative and productive workplace relations and preventing disputes” as distinct from *dealing with* a dispute² or exercising some other function to make an instrument or determine a “matter” justiciable under specific provisions.
3. In our view, the authoritative statements of this Commission which it ought to apply in this review are:
 - a. Paragraph [171] of the May 2023 decision in the *Aged Care Work Value* case³:

“The inclusion of s.134(1)(aa) in the modern awards objective requires the Commission to take into account the need to improve access to secure work across the economy. We consider that this is a neutral consideration in the current context. Whilst ‘secure work’ is undefined, we consider that it is directed at a similar purpose to the new reference to ‘job security’ in the objects of the Act. We agree with the Commonwealth’s submission that secure work is concerned with the security of a person’s position while employed. The consideration of s.134(1)(aa) would be most directly engaged in relation to considering terms such as those relating to the forms of employment, the conditions of engagement and termination of employment, and terms relating to levels of certainty and predictability of when work is performed, from the perspective of an employee. Increases to the minimum rate of pay may increase the attractiveness of the work and in doing so positively impact recruitment and retention in the aged care industry. They may encourage an employee to seek

¹ President’s Statement, 15/9/23 at [7].

² See FW Act s. 595(1)

³ [2023] FWCFB 93

employment in and remain employed in the industry, however the rate of pay itself does not provide either lower or higher levels of secure work or job security from an employee perspective. The issues of attraction and retention of employees are more relevantly considered, and in the Stage 1 decision have been, in relation to s.134(1)(c).”

b. And paragraphs [28] – [30] of the 2022-23 *Annual Wage Review* decision⁴:

“Job security is not a matter that has, in terms, been taken into account in previous Review decisions. In the award context, job security is a concept which is usually regarded as relevant to award terms which promote regularity and predictability in hours of work and income and restrict the capacity of employers to terminate employment at will. The award provisions which are likely to be most pertinent in this respect are those which concern the type of employment (full-time, part-time, casual or other), rostering arrangements, minimum hours of work per day and per week, the payment of weekly or monthly rather than hourly wages, notice of termination of employment and redundancy pay (noting that a number of these matters are dealt with in the NES).

Beyond the immediate award context, job security has a broader dimension and may be understood as referable to the effect of general economic circumstances upon the capacity of employers to employ, or continue to employ, workers, especially on a permanent rather than casual basis. In exercising the Commission’s modern award powers, consequential effects of this nature arise for consideration under ss 134(1)(f) and 284(1)(a), and have always been taken into account on this basis in past Review decisions.

As set out above, paragraph 334 of the REM explains that the reference to promoting job security in s 3(a) recognises the importance of employees and job seekers ‘having the choice’ to be able to enjoy as much as possible ‘ongoing, stable and secure employment that provides regular and predictable access to beneficial wages and conditions of employment’. We see no reason to consider that the expression ‘secure work’ in s 134(1)(aa) bears any substantially different connotation to ‘job security’ in s 3(a). However, we consider that it is significant that s 134(1)(aa) refers to ‘the need to improve access’ to secure work rather than the general promotion of job security. The language of s 134(1)(aa) suggests that it is more tightly focused on the capacity of employees to enter into work which may be characterised as secure. This appears

⁴ [2023] FWCFB 3500

to reflect the REM's reference to the importance of employees being able to have a 'choice' to enter into secure employment. As such, the consideration in s 134(1)(aa) would appear to direct attention primarily to those award terms which affect the capacity of employees to make that choice. This is not a matter likely to be of substantial relevance to the consideration of minimum award wages in the conduct of the Review except perhaps in respect of the casual loading. The fact that s 134(1)(aa) finds no equivalent in s 284(1), such that the secure work consideration has no application to the NMW, supports our conclusion in this respect. However, the broader dimension of job security to which we have referred will, of course, continue to be highly relevant in our consideration under ss 134(1)(f) and 284(1)(a)."

4. Some submissions to this review seek to quarrel with these authorities, in particular:
- a. Ai Group, at [27]-[48] pay no regard to the need to consider "access to secure work" ".from the perspective of the employee.", and urge an interpretation of 134(1)(aa) that is more consistent with construction given by the Commission to existing considerations in 134(1)(c)⁵ and 134(1)(f)⁶. The flawed logic of this approach results in the Ai Group advancing proposals⁷ designed to give an employer more of a free hand in dictating the flexibility they can demand of their employees, without regard to employees' interests in regularity, predictability or any of the other incidents of secure work recognised in the authorities referred to above.
 - b. The NSW Business Chamber faintly suggest that the construction question be resolved in consultative process⁸, before suggesting that s134(1)(aa) as a distinct limb of consideration is nonetheless impliedly subject to others even when considered alone.⁹ This reasoning provides a springboard to agitate for the erosion of overtime entitlements¹⁰, minimum engagement rules¹¹ and rostering provisions¹² based on assertions concerning how such variations would benefit employers.

⁵ The need to "promote social inclusion through increased workforce participation" has been equated with increasing employment and the supply of jobs: [2013] FWCFB 4000 at [101]; [2015] FWCFB 3500 at [418] – [419]

⁶ The "effects on business" include potential disemployment effects: [2023] FWCFB 3500 at [29]; [2015] FWCFB 3500 at [335].

⁷ At [131]

⁸ At [77]

⁹ At [90] – [93].

¹⁰ At [192] – [193]

¹¹ At [182] – [183]

¹² At [214]

- c. ACCI directly contradict the authorities referred to above, by maintaining that questions of employer capacity are intrinsic to s. 134(1)(aa) itself, rather than the overall assessment of what is necessary for a fair and relevant safety net¹³.

None of those submissions should be accepted.

5. It is not in dispute that the amended provisions operate in a context in which a number of competing considerations need to be taken into account in an evaluative exercise¹⁴. However, this fact does not justify ignoring their effect¹⁵, or implying that “the need to improve access to secure work...” as an independent consideration is somehow qualified in its meaning *prior* to that evaluative exercise being undertaken¹⁶.

¹³ At [15] – [16].

¹⁴ *SDA v. Ai Group* [2017] FCAFC 161 at [48]-[50]

¹⁵ See AMIC submission at [10.1] – [10.5], AHEIA submission at [4](viii), Ai Group submission at [205], Australian Retailers Association at page 2.

¹⁶ See Ai Group submission at [34]-[35], NSW Business Chamber at [92]-[93], ACCI at [15] – [16].

Industry specific dimensions

6. We welcome the Commission's clarification that the review relating to job security is not confined to the seven modern awards identified in the President's Statement of 15 September 2023.¹⁷
7. We are however concerned to ensure that the industry specific matters raised by our affiliates, particularly as relevant to Question 3 of the discussion paper, are able to be ventilated appropriately. In our view, the issue of what is "relevant and necessary" (as referred to in the question) for any particular modern award must be approached having regard to some factual and contextual matters which are unique to the industries and occupations to which that award relates.
8. We note that the Commission's Statement of 7 February 2024, which advised of the consultation timetable, provided that "Interested parties may request further consultation dates, including that further dates be allocated for specific subject areas".¹⁸ In its further Statement of 9 February, the Commission declined to convene "industry specific consultations"¹⁹ yet otherwise permitted parties to "...raise in consultation matters raised in their submissions, including industry specific matters as they related to the specific subject matters as detailed in our statement 6 February 2024."²⁰ (emphasis added). This reveals a complexity in that the relevant "subject matter" of the consultation scheduled to consider question 3 is expressed in in the 6 February Statement as "...questions 1,2 and 3 regarding other provisions in seven modern awards"²¹ (emphasis added). This is so notwithstanding that the only question in the discussion paper which is clearly *expressed* as relating to "seven modern awards" is question 1.
9. In our view, it would be optimal to have some further indication as to how this complexity may be rectified in a way that enables parties to have clarity as to whether the issues they have advanced in response to these questions may be ventilated, and if so when.

¹⁷ [2024] FWC 358 at [4].

¹⁸ At [9].

¹⁹ At [6].

²⁰At [5].

²¹ At [8](3).

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