Australian Industry Group

Modern Awards Review 2023 – 24
Work & Care

Submission
(AM2023/21)

26 March 2024

AM2023/21 MODERN AWARDS REVIEW 2023 – 24

WORK & CARE

1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) relates to the *'Work and Care'* stream of the Modern Awards Review 2023 – 24 (**Review**). It relates to:

   (a) A literature review published on 8 March 2024 (**Literature Review**);

   (b) A submission filed by the Australian Council of Trade Unions (**ACTU**) on 12 March 2024 (**ACTU Submission**);

   (c) A submission filed by the Australian Manufacturing Workers' Union (**AMWU**) on 12 March 2024 (**AMWU Submission**);

   (d) A submission filed by the Shop, Distributive and Allied Employees' Association (**SDA**) on 12 March 2024 (**SDA Submission**);

   (e) A submission filed by the Australian Services Union (**ASU**) on 12 March 2024 (**ASU Submission**);

   (f) A submission filed by the United Workers' Union (**UWU**) on 12 March 2024 (**UWU Submission**);

   (g) A submission filed by the Health Services Union (**HSU**) on 11 March 2024 (**HSU Submission**);

   (h) A submission filed by the Australian Nursing and Midwifery Federation (**ANMF**) on 12 March 2024 (**ANMF Submission**);

   (i) A submission filed by the Community and Public Sector Union – SPSF Group (**CPSU**) on (**CPSU Submission**);

   (j) A submission filed by Carers NSW on 12 March 2024 (**Carers NSW Submission**);

   (k) A submission filed by Carers Tasmania on 12 March 2024 (**Carers Tasmania Submission**);

(l) A submission filed by the Centre for Future Work (**CFW**) on 12 March 2024 (**CFW Submission**);

(m) A submission filed by the Work + Family Policy Roundtable (**WFPR**) on 12 March 2024 (**WFPR Submission**);

(n) A submission filed by the Australian Chamber of Commerce and Industry (**ACCI**) on 12 March 2024 (**ACCI Submission**); and

(o) A submission filed by the Business NSW and Australian Business Industrial (**ABI**) on 12 March 2024 (**ABI Submission**).

2. In broad terms; the submissions filed by the ACTU, its affiliates, Carers NSW, Carers Tasmania, CFW and WFPR propose various significant, if not radical, changes to the safety net. The substantial nature of the variations proposed, and the significant impacts that many of them would potentially have on employers and the economy, cannot be understated. In the ordinary course, any one proposal of this nature would be the subject of a major proceeding before the Fair Work Commission (**Commission**), involving detailed submissions and evidence. Often, it would constitute a proceeding in the nature of a test case, in which a large number of union and employer organisations would participate.

3. Despite the significance of their claims, the moving parties have advanced no more than a short submission and unsubstantiated factual propositions, many of which we would contest. They largely ignore the profound impact that many of their claims, separately and cumulatively, would have on employers and the economy more generally. Unlike the modest proposals advanced by Ai Group in its submission (dated 12 March 2024 (**March Submission**)), it cannot be said that the aforementioned parties' proposals have obvious industrial merit, are balanced or would apply fairly to both employers and employees.

4. As will be borne out in the submissions that follow, we oppose the overwhelming majority of claims made by the unions. The Commission should not endorse or adopt them in this Review. Based on the material before it, the Commission cannot be satisfied that any of the changes sought by the relevant parties would be appropriate; or, more relevantly, would be *necessary* for the purposes of s.138

of the *Fair Work Act 2009* (**Act**). Moreover, the nature of this process does not facilitate due consideration being given to the issues arising from the proposals. The nature of the consultation process to be conducted before the Commission in coming weeks and the material filed to date will not permit a robust assessment of the relevant claims. To that end, in the absence of any consensus being reached between the parties, it would be unfair and inappropriate for the Commission to express any views about the proposals (be they preliminary views or otherwise).

5. Due to the volume and nature of the submissions advanced by the various moving parties, coupled with the limited period of time available to prepare these submissions, it has not been practicable to comprehensively deal with all of the material filed. Rather, our submission seeks to highlight some of the key arguments against it.

2. AI GROUP'S POSITION, IN SUMMARY

6. The ability to combine paid employment with ongoing caring responsibilities is an important social and economic objective.

7. The ACTU contends that *'much of modern work is still organized around an old idea: the default (male) employee unencumbered by parenting and caring responsibilities'*.[1] We disagree. As set out in our March Submission, the existing safety net, in numerous ways, provides important means of providing working carers with the flexibility to both work and care. In addition, employers commonly provide additional forms of flexibility and support.

8. The diversity of the caring population and their caring circumstances should not be shoehorned into one form of employment. To maximise continued workforce participation by carers, it is essential that the safety net supports the ongoing availability and viability of different employment arrangements, such as full-time, part-time, casual and fixed-term employment, to ensure that carers are provided with maximum work opportunities.

9. For example, a focus solely on full-time permanent employment for carers is likely to exclude many from the labour market, who may have no desire to commit to working full-time hours each week. The many mature-age workers who are carers may not wish to conform to ongoing permanent working arrangements for a variety of reasons; including work preferences, a desire to exercise a greater level of choice as to when and how they work and a desire to engage in other non-work related or unplanned activities. To this end, non-full-time employment such as part-time or casual employment should remain viable alternatives. Many of the claims advanced by the unions in this process would, however, considerably jeopardise their availability.

[1] ACTU Submission at [11].

10. In addition, it must be acknowledged that the facilitation of participation by carers in the workforce requires a whole-of-community response. There are many varied and complex reasons why some carers do not so participate, including factors that have little, if anything, to do with the availability of employment opportunities that would suit them.

11. Importantly, the availability of early childhood education and care (**ECEC**) is critical to the needs of working parents and carers, including those who want to work or work more hours. ECEC is essential to enabling increased workforce participation for many parents, particularly women. Employers have a strong interest in the availability of quality and flexible ECEC, enabling greater workforce participation from workers who also have caring or parenting responsibilities.

12. Reform is needed for not just more affordable, but more accessible ECEC. Many households are unable to access ECEC because their working arrangements cannot be accommodated by the locations and hours of operation of centre-based care. New models of ECEC are needed.

3. CONSIDERATIONS ASSOCIATED WITH GENDER EQUALITY

13. Throughout the submissions of the ACTU and its affiliates, there is considerable focus on issues associated with gender. They argue that most primary carers are women and thus, women are disproportionately impacted by any challenges associated with simultaneously working and caring. Section 134(1)(ab) of the Act is cited as lending support to the unions' proposals to vary awards. It is in the following terms:

> (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

14. We make two brief observations about these submissions:

    (a) Section 134(1)(ab) is one of many considerations that must be taken into account by the Commission when assessing whether an award achieves the modern awards objective (**MAO**). We refer to and rely on Chapter 2 of the March Submission in this regard.

    (b) The variations proposed by Ai Group in the March Submission would *'facilitate women's full economic participation'*, whilst also balancing the impact that they would have on employers, as required by the MAO. In contrast to the many union claims, they reflect an approach that would be fair and appropriate.

15. In the context of some of the specific claims advanced by the unions, they also argue that awards covering feminised sectors or occupations, in some respects, purportedly contain inferior terms and conditions relative to awards that cover male-dominated industries or occupations. It is said that in order to achieve the outcomes described by s.134(1)(ab), the former should be varied to reflect the latter. The unions also argue that to some degree, those differences reflect gender-based undervaluation.

16. The unions' overly simplistic arguments should not be adopted.

17. Differences in terms and conditions between different awards do not, *prima facie,* establish gender-based undervaluation of work. Rather, they more likely reflect the varying modes of operation and the differing circumstances and challenges facing employers covered by different awards. Plainly, the operational realities of manufacturers covered by the *Manufacturing and Associated Industries and Occupations Award 2020* (**Manufacturing Award**) are very different to those of disability care providers covered by the *Social, Community, Home Care and Disability Services Industry Award 2010* (**SCHCDS Award**).

18. Far more than merely pointing to differences in terms and conditions is required to establish any gender-based undervaluation of work. For example, it would be necessary to consider the origins of the relevant award terms and the bases upon which they were developed and / or have evolved over time. None the material filed by the unions deals with such nuances.

19. Further, the Commission should resist any calls to cherry-pick terms and conditions from one award and insert them in another. The MAO is, and must remain, the overriding consideration when determining whether a variation or proposed term is necessary. As has previously been acknowledged by the Commission, the application of the MAO may result in different outcomes between different modern awards.[2]

[2] *4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

4. THE LITERATURE REVIEW

20. In the time available and in light of the significant volume of material filed by the unions in this matter, we are not in a position to deal with the Literature Review at this time.

21. It is also relevant that since it was published (on 8 March 2024), Ai Group has been involved extensively in a number of other major matters before the Commission[3], which has further affected our capacity to consider and address the Literature Review in this submission. There have merely been four business days in the intervening period on which we have *not* appeared before the Commission, nor have we been required to file material, in respect of any of the relevant matters.

[3] AM2023/21 Modern Awards Review 2023 – 24 – Making Awards Easier to Use (Conference before Hatcher J on 8 March 2024);

AM2023/30 Rail Industry Award 2020 (Consulting members regarding applicants' claims filed on 8 March 2024)

AM2023/21 Modern Awards Review 2023 – 24 – Work and Care (Submission in chief filed on 12 March 2024);

AM2023/21 Modern Awards Review 2023 – 24 – Making Awards Easier to Use (Conference before Hatcher J on 12 March 2024);

AM2023/21 Modern Awards Review 2023 – 24 – Making Awards Easier to Use (Conference before Hatcher J on 13 March 2024);

AM2023/21 Modern Awards Review 2023 – 24 – Job Security (Conference before Gostencnik DP and Tran C on 14 March 2024);

B2023/1235 Application for a supported bargaining authorisation – Submission filed on 15 March 2024;

AM2023/21 Modern Awards Review 2023 – 24 – Job Security (Conference before Gostencnik DP and Tran C on 18 March 2024);

AM2023/21 Modern Awards Review 2023 – 24 – Making Awards Easier to Use (Conference before Hatcher J on 20 March 2024);

AM2023/28 Ai Group application to vary the *Social, Community, Home Care and Disability Services Industry Award 2020* (Directions hearing before Hatcher J on 22 March 2024);

AM2024/6 Delegates' Rights Term (Submission in reply due on 28 March 2024); and

C2021/1 Annual Wage Review 2023 – 24 (Submission due on 28 March 2024).

22. On 8 March 2024, the Commission published a statement regarding the Work and Care stream of the Review. The statement confirms that the Commission intends to conduct a survey of employers and indicates that the final report of survey outcomes will not be published until 31 May 2024.[4]

23. Further, in an earlier statement issued by the President, His Honour Justice Hatcher indicated that the Review will be completed *'by way of the publication by the Commission of a final report on or about 28 June 2024'*.[5]

24. Taking into account the above matters, Ai Group seeks an extension of time to file a submission in response to the Literature Review, until 4.00 pm on 26 April 2024. The extension sought also takes into account our involvement in a raft of upcoming proceedings and other material that we are required to file, over the coming four week period. It does not appear that the grant of the extension of time sought will delay the completion of the Review or the preparation of the Commission's report regarding matters dealt with in this part of the Review. This is particularly so given the results of the survey will not be published until the end of May.

25. In the alternate, as a matter of fairness[6], the Commission should not afford any weight to the Literature Review. By extension, it should not adopt any of the observations, conclusions or recommendations made therein.

[4] *Modern Awards Review 2023-24* [2024] FWC 607 at [8].

[5] *Modern Awards Review 2023-24* [2024] FWCFB 179 at [2].

[6] Section 577(1)(a) of the Act.

5. QUESTION 1 – PART-TIME EMPLOYMENT

26. Question 1 is as follows:

> Are there any specific variations to part-time provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

27. Before responding to the specific submissions advanced by other parties to question 1; we observe that the ACTU and unions' claims would generally have the effect of further constraining the useability of part-time employment. Their proposals would introduce additional costs and inflexibilities that would often result in employers instead relying on other forms of labour, such as casual employment. This would be contrary to the interests of many employees with caring responsibilities, who wish to be engaged on a permanent part-time basis. As we have submitted in the Job Security stream of the Review, it would also be contrary to the interests of improving access to secure work, as described by s.134(1)(aa) of the Act.

ACTU ([29] – [34] and Recommendation 2)

28. The ACTU's Recommendation 2 is comprised of six proposals. We oppose each of them, for the reasons that follow. We also note that whilst the ACTU appears to suggest that its claims would address the alleged underemployment of part-time employees,[7] they would in our submission have the very opposite effect. The provision of additional hours of work to a part-time employee should instead be encouraged through the adoption of the proposal we advanced in our March Submission at [89] (particularly [89](c)).

29. *First,* the ACTU submits that awards should *'provide security around patterns of hours that have become regular. For example, where additional hours are worked on a regular basis over 6 months, employees should have the right to elect to convert those additional hours to be part of their permanent ordinary*

[7] ACTU Submission at [31].

contracted hours. There should be provision for 6 monthly reviews of part time hours to facilitate this."[8]

30. To our knowledge, only a small number of awards presently contain provisions of the nature described by the ACTU. However, such awards contain a model of part-time employment that is more flexible than the default found in most awards. For example, the SCHCDS Award contains a review mechanism that is substantively similar to the clause described by the ACTU[9], however, it also permits the performance of *'additional hours'* of work, in excess of a part-time employee's agreed hours, by agreement at ordinary rates, unless they exceed 38 ordinary hours in a week or 10 ordinary hours in a day.[10]

31. By contrast, we cannot see a basis for introducing a mechanism for reviewing part-time employees' hours of work where overtime rates are payable for work performed outside the employee's agreed hours, as is the case under most awards. As a product of the requirement to pay overtime rates, there would be little (if any) incentive for an employer to engage an employee to work additional hours unless strictly necessary. At the very least, an employer is not likely to do so regularly. Indeed, such awards *discourage* employers from offering additional work.

32. *Second,* the ACTU submits that awards should afford *'fairness and certainty on minimum engagements, including on a weekly basis for part time workers (for example a 15 hour minimum for part time employees in the awards that cover SDA members, as identified in the SDA submission'*.[11]

33. We deal with the issue of minimum engagement and payment periods primarily in Chapter 10 of this submission.

[8] ACTU Submission at page 20.

[9] Clause 10.3(g) of the SCHCDS Award.

[10] Clauses 10.3(f) and 28.1(b) of the SCHCDS Award. See also *Hospitality Industry (General) Award 2020* at clause 10.

[11] ACTU Submission at page 20.

34. As for the proposition that a weekly minimum period should apply to part-time employees; we again oppose this proposal. Plainly, it would confine the circumstances in which an employee can be engaged as a part-time employee. For example, where an employee is not available to work for at least the minimum number of hours (including for reasons associated with caring responsibilities), the relevant award would not permit their engagement as a part-time employee. Conversely, there may be circumstances in which an employer requires an employee to perform less than the minimum number of hours of work in a week.

35. In each of the aforementioned circumstances, the award would preclude the employee from being engaged on a part-time basis. Whilst in some cases, the employee may be able to be engaged as a casual employee, careful consideration would need to be given to whether the statutory definition at s.15A of the Act would permit this. In particular, an employee who is given a firm advance commitment to continuing and indefinite work would not be able to be engaged as a casual employee under the new statutory definition, which will commence operation from 26 August 2024.

36. It cannot be said that the aforementioned outcomes are in the interests of employees with caring needs (or, with improving access to secure work; that being another area of focus in this Review). Indeed, in some cases, it may result in certain employees being excluded from the workforce.

37. *Third,* the ACTU contends that awards should ensure that *'prior to commencing employment, employers and employees agree in writing on a regular pattern of work including the days, hours and start/finish hours'*.[12] *Fourth,* the ACTU says that *'part time workers [should be] paid overtime for working outside agreed hours'*.[13]

38. The vast majority of awards contain a framework for part-time employment that is in the very terms advanced by the ACTU. Whilst it has not identified any specific awards that deviate from that model, we acknowledge that a small

[12] ACTU Submission at page 20.

[13] ACTU Submission at page 20.

number do so. Typically, there is a clear basis for this, taking into account the nature of the industries in which the relevant awards operate and the manner in which hours need to be arranged in those sectors. We would oppose any such existing arrangements being disturbed. Many have been the subject of specific arbitral consideration.

39. We deal with the *fifth* and *sixth* proposals jointly. The ACTU argues that awards should provide a process *'whereby employees who work hours that are "irregular, sporadic or unpredictable" are given an opportunity to express their interest in working hours which are regular and predictable, and an obligation on employers to provide such hours where operational requirements allow'*. Separately, the ACTU contends that employers should be required to *'inform employees [who have expressed an interest in working hours which are regular and predictable] when such hours were available to them … and what payment they would attract'*.

40. We would oppose any such change. These are not matters that should be regulated by awards. Further, they would unfairly increase employers' compliance burden. Employees can, at any time, express a desire to work a different pattern of hours. It is not necessary for an award to give them the opportunity to do so.

41. Additionally, awards should not be amended to require the allocation of work to certain employees. Clearly, any such award terms would unreasonably interfere with an employer's prerogative to determine how it assigns its resources. An employer should be at liberty to elect how it allocates work, taking into account various matters, including the skills and competencies required. Considerations associated with the efficient and productive performance of work are paramount in an employer's consideration of how work is allocated. This should not be disturbed.

SDA ([47] – [106] and Recommendations 1 – 5)

42. The SDA's submissions concerning part-time employment relate to a range of issues. We deal with each in turn.

43. We also note that of the awards that are the subject of the SDA Submission,[14] Ai Group has an interest in the *General Retail Industry Award 2020* (**GRIA**), the *Fast Food Industry Award 2020* (**FF Award**), the *Hair and Beauty Industry Award 2020* (**HABA**), the *Storage Services and Wholesale Award 2020* and the *Vehicle Repair, Services and Retail Award 2020* (**Vehicle Award**). These awards contemplate an ability to unilaterally change part-time employees' hours in limited circumstances (if at all) and do not grant an employer an unfettered right to require an employee to work additional hours (at ordinary rates or otherwise). The SDA's submissions about the manner in which part-time employees are purportedly being engaged must be seen in this context.[15] The safety net contemplates very little flexibility in relation to the engagement of part-time employees.

Minimum Hours of Work

44. The SDA's Recommendation 1 is that a *'weekly minimum'* of 15 hours should be introduced in respect of part-time employees.[16] We strongly oppose this proposal, for the reasons set out above in response to the second element of the ACTU's Recommendation 2.

45. We also observe that the proposal is particularly problematic in the context of industries such as fast food and retail, in which many young employees with study commitments are employed. In many cases, such employees would no longer be able to be employed on a part-time basis, because they are not available to work more than the required number of hours.

[14] SDA Submission at [24].

[15] SDA Submission at [53] – [70].

[16] SDA Submission at [70].

46. We would anticipate that employees with caring responsibilities are also disproportionately impacted by any such requirement, because many would have limited availability to work.

Additional Hours of Work

47. The SDA's Recommendation 2 is that the aforementioned awards should be varied to *'allow for the agreement to work additional 'ordinary' hours above base contract hours to include either payment at overtime rates or alternatively, payment as ordinary hours (with leave accrual) paid at ordinary hourly rates plus an additional penalty of at least 25%'.*[17]

48. Employers should not be penalised for offering additional hours of work to part-time employees, particularly where employees are at liberty to refuse that offer. That is, an employer cannot *require* a part-time employee to perform additional ordinary hours of work, beyond their agreed hours.

49. A requirement to pay the proposed 25% penalty is likely to discourage employers from offering additional hours of work to part-time employees. Employers would instead consider other available options, such as engaging casual employees to perform the relevant work. This does not serve the needs of underemployed part-time employees wishing to perform more work. It also does not meet the needs of employers who, for various operational reasons, require additional hours to be worked at short notice (but they are not in a position to guarantee those hours of work on an ongoing basis).

50. In the Making Awards Easier to Use (**MAEU**) stream of the Review, Ai Group has proposed that the FF Award and GRIA be varied to allow for a part-time employee to provide *'standing consent'* that the employee is agreeable to work additional hours (where offered and agreed) which will be treated and paid for as ordinary hours.[18] That proposal should be preferred to that of the SDA's. We refer to and rely on the submissions there made.

[17] SDA Submission at [83].

[18] Ai Group Submission dated 22 December 2023 at [261] – [274] and [328] – [352].

51. The SDA also submits, at Recommendation 3, that awards should be varied *'to include a positive obligation on employers to provide employees with a 'right to say no' to additional shifts, without repercussions'*.[19]

52. In support of the above recommendation, the SDA relies on a series of anecdotes from unnamed employees about their purported fears and the repercussions they have allegedly faced when refusing or seeking changes to shifts.[20] Plainly, this aspect of the SDA Submission should not be given any weight. The material filed does not identify the relevant employees or employers, nor does it properly particularise the bases for the employees' views. It is not of any probative value and should be treated as such by the Commission.

53. The recommendation advanced should not be adopted. We dispute any contention that there is widespread unfair treatment of employees who decline to perform additional work. Moreover, it is not clear how the proposed obligation would operate in practice or how employers could *'provide employees with a 'right to say no' to additional shifts'*.

Increasing Permanent Hours

54. Clause 10.11 of the GRIA provides a mechanism for reviewing a part-time employee's guaranteed hours. The SDA argues that it should be varied in various ways and that the provision, as varied, should also be inserted in other awards in which it has an interest.[21]

55. We oppose the SDA's argument that the provision should be inserted in other awards, for the reasons articulated above in response to a similar submission made by the ACTU.

[19] SDA Submission at [94].

[20] SDA Submission at [90].

[21] SDA Submission at [97] – [101].

56. As for the specific variations proposed by the SDA to clause 10.11 of the GRIA[22], we say as follows:

(a) Employees must not be given a unilateral right to convert *'additional'* hours to *'regular'* hours, for reasons that should be plain. It simply cannot be assumed that an employer can guarantee the provision of additional hours on a permanent and ongoing basis. Ultimately, any such entitlement is likely to result in the redundancy of the employee's position and the potential termination of the employee's employment on that basis.

(b) Employers should not be saddled with a positive obligation to review and convert employees' additional hours to guaranteed hours, for reasons that we come to later in response to the HSU Submission.

(c) Awards cannot give the Commission power to arbitrate a dispute, except where agreed between the parties.[23] Thus, the final limb of the SDA's proposal must fail.

57. The SDA also proposes, in Recommendation 5, that the relevant awards should be varied to include *'a right to become full time when working an average of 35 hours or more per week on a reasonably regular basis'*.[24]

58. This proposal is self-evidently absurd. Employees cannot sensibly be given a unilateral right to convert to full-time employment. It would be deeply unfair and plainly unworkable to require employers to provide full-time hours (of work or pay) to employees who have been working part-time hours. The impact on employers of such a proposal cannot be understated. An award provision of this nature is also likely to deter employers from engaging part-time employees for 35 or more hours in a week, which may adversely impact some employees.

[22] SDA Submission at [100].

[23] Sections 595 and 739 of the Act.

[24] SDA Submission at page 11.

ASU ([18] – [23])

59. The ASU proposes that awards should contain the following *'key terms'* in respect of part-time employment:

    (a) Reasonably predictable hours of work;

    (b) A written agreement outlining a regular work pattern, which should include each day's working hours, designated days and starting and finishing times. In addition, the written agreement should acknowledge that *'agreed hours do not need to be the same each week'* and that the agreed hours may be varied in writing.

    (c) Overtime is payable for all work outside the *'notified roster'*.

    (d) An employee is entitled to receive, on a pro rata basis, pay and conditions equivalent to those of full-time employees who do the same kind of work.

    (e) Employees have a right to request an *'update to their contractual work hours after consistently exceeding their contracted hours for six months'*. In addition, the provision should *'encompass the possibility of transitioning to full-time employment if an employee consistently works full-time hours'*.[25]

60. The vast majority of awards already contain provisions of the nature described by the ASU at paragraphs (a), (b) and (d) above. Further, in respect of paragraph (c), overtime is generally payable for work performed outside agreed hours. To the extent that some awards do not contain such provisions, we rely on our response to the third and fourth elements of the ACTU's Recommendation 2.

61. In respect of the proposal at paragraph (e), we refer to our earlier response to the first element of the ACTU's Recommendation 2.

62. The ASU also advances various specific submissions about the SCHCDS Award.[26]

[25] ASU Submission at [19].

[26] ASU Submission at [20] – [23].

63. The part-time employment framework in the SCHCDS Award was the subject of recent consideration by a Full Bench of the Commission, during the 4 yearly review of modern awards. After taking into account detailed submissions and evidence from a range of interested parties, the Commission expressly declined to grant a claim advanced by the HSU for a variation to the award such that part-time employees would be entitled to overtime for all work performed in addition to their agreed hours. Careful consideration was given by the Commission to the potential implications that such a requirement would have on employers in the sector, many of whom rely on Government funding to provide their services. In particular, the Commission said as follows:

> **[971]** Granting this aspect of the HSU's claim would remove a flexibility from the SCHADS Award which the Commission has acknowledged is calibrated to meet industry needs. As noted by the *Part-time and Casual Employment* Full Bench, the current Award terms provide 'considerable capacity to assign additional hours that may arise at short notice to employees without the cost exceeding what the NDIA price structure will allow'. Significantly, under the NDIS an employer cannot recover the overtime cost of a part-time employee's additional hours.
>
> **[972]** The evidence is that many part-time employees want to (and do) work additional hours and there is no evidence to suggest that part-time employees are being forced to work additional hours. These findings are relevant because granting the claim will create a disincentive for employers to make additional hours available to part-time employees (as opposed to casual employees).[27]

64. The Commission went on to insert the now clause 10.3(g) of the award, which provides a mechanism for reviewing part-time employees' hours of work.[28]

65. The ASU's submissions do not establish a basis for departing from the conclusions reached by the Commission in the aforementioned proceeding.

66. Finally, in response to the ASU's suggestion that the Commission *'should consider if weekly minimum engagements are necessary'* in the SCHCDS Award,[29] we refer to our earlier response to the second element of the ACTU's Recommendation 2.

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[27] *4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010—Substantive claims* [2021] FWCFB 2383 at [971] – [972].

[28] PR737905.

[29] ASU Submission at [23].

UWU ([5] – [14])

67. The UWU submits that part-time employment provisions should feature various key elements,[30] which overlap substantially with those proposed by the ACTU. Thus, we refer to our response to its proposals above.

68. The UWU also makes various complaints about the operation of the SCHCDS Award, as it relates to part-time employees. We refer to and rely upon the submissions made earlier in response to the ASU.

69. Further, the UWU's submission appears to overstate the flexibility afforded by the part-time employment provisions in the SCHCDS Award. The Award requires that a part-time employee and employer must reach agreement as to the employee's hours of work upon engagement and those agreed hours can be varied only with the employee's consent. This necessarily provides employees with certainty about those hours of work.

HSU ([12] – [29] and Proposals 1 – 3)

70. The HSU Submission deals with three issues:

    (a) The pattern of hours of a part-time employee under the *Health Professionals and Support Services Award 2020* (**HPSS Award**);

    (b) Inserting a mechanism for reviewing part-time employees' hours of work; and

    (c) Payment of overtime.

71. We deal with each in turn.

<u>Pattern of Hours</u>

72. Ai Group opposes Proposal 1 advanced by the HSU, which relates to part-time employment under the HPSS Award.[31]

[30] UWU Submission at [6].

[31] HSU Submission at page 5.

73. The HSU contends that the award should be varied to *'clarify'* that a part-time employee's agreed hours must be the same each week.[32] That is, an arrangement that involves a two or four week cycle (for example) is not permitted by the award.

74. In our submission, the award presently allows an arrangement of the nature described by the HSU, provided it constitutes a *'regular pattern of work'*.[33] That position should not be altered. It would further restrict the operation of the extant provisions and disturb existing arrangements already in place.

75. The requirement that the arrangement constitute a *'regular pattern'*, coupled with the need for agreement between the employer and employee, safeguard against the prospect of employees' hours changing week to week. Such an arrangement is unlikely to constitute a *'regular pattern'*.

76. The HSU refers to clause 10.3(d) of the SCHCDS Award, which is in the following terms:

> The agreed regular pattern of work does not necessarily have to provide for the same guaranteed hours each week.

77. The union seeks to rely on the *absence* of such a provision in the HPSS Award in support of the proposition that the award does not permit a pattern of hours that differs week to week.[34] That submission is misplaced. The aforementioned provision of the SCHCDS Award was inserted during the 4 yearly review. In doing so, a Full Bench of the Commission observed that it merely clarifies the meaning of the pre-existing part-time employment provisions (which were in relevantly similar terms to those found in the HPSS Award).[35]

[32] HSU Submission at [18].

[33] Clause 10.2 of the HPSS Award.

[34] HSU Submission at [17].

[35] *Four yearly review of modern awards – Casual and part-time employment* [2017] FWCFB 3541 at [641].

Review of Hours

78. The HSU has proposed a review mechanism concerning part-time employees' hours, for the HPSS Award and the *Aged Care Award 2010* (**Aged Care Award**). It also argues that the existing provision providing for such reviews in the SCHCDS Award be replaced with its proposal.

79. In respect of the principle of inserting such a provision in the HPSS Award and Aged Care Award, we oppose this for the reasons set out earlier regarding a similar proposal advanced by the ACTU.

80. We also oppose the specific proposal advanced. In particular:

    (a) The provision would place the onus on an employer to continually review its part-time employees' hours, for the purposes of ascertaining when any of them satisfy the eligibility criteria prescribed by the clause. This would place a significant regulatory burden on employers (particularly those that employ many part-time employees); and

    (b) The obligation to offer increased guaranteed hours of work would arise even if the additional hours worked by the employee did not follow the same *pattern*. That is, the obligation would apply even if the additional hours were worked on varying days and at varying times. It is particularly unlikely that in such circumstances, an employer will be in a position to guarantee additional hours on an ongoing basis. Employers should not be put to the task of having to review employees' hours and make an offer in such circumstances.

Payment of Overtime

81. The HSU submits that the SCHCDS Award be varied to require that a part-time employee is paid at overtime rates for any time worked in addition to a part-time employee's agreed hours.[36]

[36] HSU Submission at [29].

82. We strongly oppose this proposal. We rely on the submissions made earlier in response to the ASU and UWU.

CPSU ([24] – [36])

83. The CPSU's submission relates to the SCHCDS Award. It contends that clause 10.3 of the award should be varied *'to include a 3-month threshold for proactive offer by an employer for increase in part time hours'*. We oppose this for the reasons articulated above in response to the HSU Submission.

84. Further, three months is an unreasonably short period of time. There could be a range of reasons why a part-time employee is offered additional hours of work over such a limited period (e.g. due to staff absences or a temporary staff shortage). This should not give rise to an obligation to offer permanently increased guaranteed hours of work.

ANMF [(24] – [46])

85. The ANMF proposes that the part-time employment provisions in the Nurses Award be fundamentally recast, such that they operate wholly by agreement with employees. That is, an employer and employee would be required to reach agreement upon commencement as to the employee's hours of work and those hours could only be varied by agreement.[37]

86. We oppose the ANMF's proposal. It would result in a radical departure from the existing safety net, which has now been in place for many years. It would potentially disrupt (or indeed, entirely displace) existing arrangements, by upending the basis upon which part-time employees are engaged to work.

87. The coverage of the Nurses Award is expressed by reference to the employees' occupation and thus, covers employers and employees operating in a broad range of industries. Any consideration of the ANMF's claim would necessitate a detailed examination of the impact that it would have in each of those parts of the economy, including aged care, private hospitals, other private medical or

[37] ANMF Submission at [38] – [40].

health settings and disability services. Clearly, such a process cannot be properly conducted in this Review.

CFW ([8] – [10])

88. The CFW submits that the *'norm for part-time jobs should be regular, predictable and stable hours of work, with minimum weekly payment periods that reflect an employee's actual hours'*.[38]

89. We refer to and rely on our submissions in response to the ACTU above.

[38] CFW Submission at [10].

6. QUESTION 2 – IFAS

90. Question 2 is as follows:

> Are there any specific variations to the individual flexibility agreement provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

ACTU ([36] – [48] and Recommendations 3 – 5)

91. The ACTU Submission in response to Question 2 replicates, with only minor variation, its submission filed in response to questions concerning IFAs in the Job Security stream of the Review.[39]

92. ACTU Recommendations 3, 4 and 5 are identical to Recommendations 7, 8 and 9 (respectively) of the ACTU's submission in the Job Security stream of this Review (**ACTU Job Security Submission**).

93. Ai Group filed a detailed response to these aspects of the ACTU Job Security Submission in its submission in reply, filed on 21 February 2024 (**Ai Group Job Security Reply Submission**).[40]

94. Ai Group does not propose to repeat those submissions here in full; we instead rely upon and adopt our previous responses to the ACTU's earlier submissions and recommendations, in response to [36] – [48] inclusive, and Recommendations 3, 4 and 5, of the ACTU Submission.[41]

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[39] See Submission of Australian Council of Trade Unions in response to the Job Security Discussion Paper, filed on 5 February 2024 (**ACTU Job Security Submission**). The ACTU Submission at [36] – [40] inclusive is in substantially similar terms to the ACTU Job Security Submission at [25] – [29] inclusive. Further, the ACTU Submission at [41] – [48] inclusive replicates the ACTU Job Security Submission at [32] – [38] inclusive.

[40] Ai Group Job Security Reply Submission.

[41] Specifically, the Ai Group Job Security Reply Submission at [123] – [126] inclusive is relied on and adopted in response to the ACTU Submission at [36] – [40] inclusive and Recommendation 3. We further rely on and adopt [130] – [147] of the Ai Group Job Security Reply Submission in response to the ACTU Submission at [41] – [48] inclusive and Recommendations 4 and 5.

95. Briefly stated however, and for ease of reference, our response to the recommendations advanced by the ACTU, is as follows:

(a) In relation to Recommendation 3: Ai Group strongly opposes the ACTU's proposal for IFA provisions to be removed from all modern awards. IFAs are an important mechanism, which can in fact improve or facilitate access to secure work and flexibility desired by employee carers. Indeed, it is Ai Group's position that in this Review, the Commission should consider how the model flexibility term could be varied to improve its workability and ease the compliance burden on employers, in ways that render it more accessible.[42] It has an important role to play in facilitating mutually beneficial arrangements between employers and employees, including those with caring responsibilities.

(b) In relation to Recommendation 4: with the exception of the first bullet point ('*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'*), Ai Group opposes the proposals on the basis that they are unnecessary and/or would result in increased complexity and regulatory burden for employers, contrary to ss.134(1)(f) and (g) of the Act. As to the first point in Recommendation 4, whilst it is not clear why the proposed change is necessary, we would not oppose it subject to further consideration being given to the specific form of words used.[43]

(c) In relation to Recommendation 5: we oppose the proposal in light of the enormous burden it would place on employers considered in the context of the many thousands of roster and shift changes that occur in large Australian businesses on an annual basis, and further, the resultant 'two-tier' system it would create in relation to IFAs operating in relation to both awards and enterprise agreements. The scale of burden and complexity

[42] See also Ai Group Job Security Reply Submission at [126].

[43] See also Ai Group Job Security Reply Submission at [132] – [133].

that would flow from such a requirement is contrary to ss.134(1)(f) and (g) of the Act.[44]

SDA ([173] – [178] and Recommendations 13 and 14)

96. The SDA relies on an isolated example of one IFA in support of its assertions regarding '*unfair individual flexibility agreements*'.[45] In doing so, the SDA has not demonstrated any widespread misuse or unfair practices by employers in relation to IFAs.

97. We disagree with the proposition put by the SDA that IFAs have reduced relevance or necessity due to recent changes to the flexible work arrangement provisions in the NES.[46] As explained in our March Submission, IFAs are an important *additional* tool to the provisions in the NES concerning the right to request flexible work arrangements. For example, it could be the case that, due to the terms of the relevant award, a particular type of flexibility requested by an employee may only be lawfully implemented using an IFA.[47] Put another way, in such circumstances, an employer may have reasonable business grounds to refuse the same request made pursuant to s.65 of the Act[48], because the terms of the applicable industrial instrument would not permit the arrangement sought.

98. The SDA's Recommendation 13 is of similar effect to Recommendation 3 in the ACTU Submission (and as a corollary, Recommendation 7 of the ACTU Job Security Submission); that is, that IFA provisions should be removed from awards.

[44] See also Ai Group Job Security Reply Submission at [145] – [147].

[45] SDA Submission at [173] – [177] and Attachment 1.

[46] SDA Submission at [177].

[47] March Submission at [100] – [101].

[48] Section 65A of the Act.

99. Ai Group strongly opposes the SDA's proposal. As we set out in our March Submission, IFAs are a tool that can be critical to accommodating flexibilities sought by employees, including for reasons relating to their carer's responsibilities.[49]

100. Rather than its removal from awards, any consideration of the model flexibility term in the context of this Review should instead focus on how it could be varied to improve the utilisation of IFAs (including by improving the workability of the model term and easing the regulatory burden associated with implementing IFAs) such as to maximise their potential utility to employees and employers as a mechanism for accommodating and balancing work and carer responsibilities.[50] Ai Group has advanced a proposal designed to achieve this end in its March Submission.

101. The SDA's Recommendation 14 is identical to the ACTU's Recommendation 4 (and as a corollary, Recommendation 8 of the ACTU Job Security Submission). We rely on [131] – [144] of the Ai Group Job Security Reply Submission, in response.

Carers Tasmania (Pages 6 – 7)

102. The Carers Tasmania Submission purports to raise two issues in respect of IFAs.

103. *First,* it deals with requests for flexible work arrangements under the NES. Its proposal that employers be required to provide a response to a flexible work request in a period that is less than 21 days, appears misconceived in the context of this Review.[51] Following changes to the NES provisions concerning flexible work requests made by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth), a Full Bench of the Commission varied the 122 modern awards which contained the model term concerning requests for flexible working arrangements, to instead replace it with a term referring to the NES (and

[49] March Submission, at [100] – [101].

[50] See also Ai Group submission dated 5 February 2024 in the Job Security stream of the Review at [186] (**Ai Group Job Security Submission**).

[51] Carers Tasmania Submission, at page 6.

accompanying note referring to the new dispute resolution jurisdiction under s.65B of the Act).[52] Accordingly, the 21-day timeframe within which an employer must respond to an employee's request for a flexible work arrangement is now contained only in the Act, not awards.

104. To the extent Carers Tasmania's proposal may be construed as a request for awards to contain a lesser period for an employer's response to flexible work requests, we would object to this. Ai Group's position is that 21 days is appropriate, taking into account the various procedural requirements now contained in s.65A of the Act.

105. As noted in the Paper, the amendments to the Act only recently commenced operation and their precise impact is therefore as yet unknown.[53] The substantive terms dealing with flexible work requests were only removed from awards on 1 August 2023.[54] Without at this stage engaging in detail with our substantive opposition to the merits of the proposal, we submit it is premature to consider any re-insertion of terms into awards dealing with flexible work requests until such time as the amended provisions in the NES have been in place for a suitable period such that their effectiveness can be assessed.

106. We also express some doubt as to whether s.55 of the Act would permit an award term of the nature potentially contemplated by the Carers Tasmania Submission.

107. *Second*, Carers Tasmania proposes that the list of matters in respect of which an IFA may be made be extended so as to permit IFAs to deal with *'where work is performed*'.[55] Whilst a small number of awards may prescribe some terms and conditions with reference to a particular work location, typically awards do not regulate *where* work is performed. It is therefore questionable what work, if any, a term that permitted an IFA to be made '*to vary the application of the terms of*

[52] *Variation on the Commission's own motion – flexible work amendments and unpaid parental leave* [2023] FWCFB 107 (***Flexible Work Amendments Decision***), at [1] – [7].

[53] The Paper at [120].

[54] Flexible Work Amendments Decision at [18].

[55] Carers Tasmania Submission at page 7.

(an) award relating to…where work is performed"[56] would do. Specifically, it is not clear that it would enable arrangements involving the performance of work from home, as contemplated by Carers Tasmania.

108. Ai Group's proposal as to how modern awards should be varied to facilitate arrangements that involve working from home, as set out at Chapter 8 of our March Submission, should instead be preferred. We consider the variations required to modern awards concerning working from home arise from a presumption that underpins various terms and conditions that work will be performed at an employer's premises (or other designated workplace), in circumstances where this presumption no longer reflects current arrangements for a vast number of Australians.

ACCI ([52] – [85])

109. The ACCI Submission at [52] – [85] reiterates the same proposal advanced by it in relation to IFAs, in the MAEU stream of the Review.[57] We repeat the submission we advanced in reply in that proceeding.

110. We share ACCI's concerns about IFAs and the model flexibility clause, as presently expressed at [55] – [57] of the ACCI Submission. We also agree, in principle, that there may be merit in clarifying the operation of the *'better off overall'* test (**BOOT**), as it appears in the model term. Nonetheless, we have some doubt as to whether the proposed clause X.6(a) would do so in a way that conforms with s.144(4)(c) of the Act.

111. For completeness; we consider that the application of the BOOT includes a consideration of financial and non-financial considerations, including whether the arrangement contemplated by the IFA would *'better meet [the employee's] genuine needs'*.[58]

[56] See wording of the model flexibility term as proposed to be amended in Carers Tasmania Submission at page 7.

[57] Australian Chamber of Commerce and Industry submission in relation to Making Awards Easter to Use dated 22 December 2023 at pages 36 – 41 (**ACCI MAEU Submission**).

[58] ACCI Submission at [61] regarding proposed clause X.6(b).

7. QUESTION 3 – FACILITATIVE PROVISIONS

112. Question 3 is as follows:

> Are there any specific variations to the facilitative provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

The ACTU (Recommendation 9 and [70] – [73])

113. In response to question 3, the ACTU recommends that:

(a) Any agreements made under a facilitative provision must ensure that employees are better off overall.

(b) The principles set out by the Australian Industrial Relations Commission in the *Award Simplification Decision*[59] be incorporated into modern awards *'to clarify'* that:

(i) Facilitative provisions are not a device to avoid an award obligation, and should not result in unfairness to employees covered by the award.

(ii) To ensure that a facilitative provision operates fairly, the Commission may prescribe safeguards, which will depend on the nature of the provisions sought and the circumstances of the particular industry.

(iii) The implementation of facilitative arrangements should be recorded in the time and wages records.

(iv) The relevant unions are notified regarding the intention to utilise the facilitative provision and provided a reasonable opportunity to participate in negotiations regarding its use.

(v) There be a monitoring process under which facilitative provisions are reviewed after a reasonable period to consider its impact in practice.[60]

[59] *Award Simplification Decision* (1999) AIRC P7500.

[60] ACTU Submission at page 32.

(c) Consideration should be given to how changes made through facilitative provisions can be subject to scrutiny by the Commission; for example, through regular reports regarding their use.

114. We oppose the ACTU's proposals, for the reasons that follow.

115. *First*, the ACTU's proposal, to introduce IFA-type terms (including the better off overall requirement) into facilitative provisions, disregards the clear differences between these types of provisions.

116. The Commission's Paper at [130] extracts the relevant passages from a decision issued during the 4 yearly review, which clearly highlights the *'significant conceptual and practical differences between the model flexibility term and facilitative provisions'*.[61] Having regard to that decision, the key differences between an IFA and a facilitative provision are as follows:

(a) An IFA has the effect of *varying* the modern award. The IFA is then taken, for the purposes of the Act, to be a term of the modern award. A facilitative provision on the other hand, does not have such effect. Rather, it prescribes the extent to which an employee(s) and employer may depart from the usual method of *implementing* an award entitlement.

(b) An IFA can vary any substantive award entitlement that is within the scope of a prescribed subject matter, namely arrangements about when work is performed, overtime, penalty rates, allowances and leave loading. There is no limit as to the extent to which an IFA can vary an award term that relates to one of the prescribed subject matters, except that it must leave the employee better off overall. On the other hand, a facilitative provision not only prescribes certain subject matters in which a facilitative arrangement may be made, but it also prescribes the outer limits of such arrangements. For example, clause 17.3(e) of the Manufacturing Award allows the averaging period of ordinary hours to be increased in excess of 28 days,

[61] *4 yearly review of modern awards—Common issue—Award Flexibility* [2015] FWCFB 4466 at [138]. See also [139] – [141].

but not in excess of 12 months. A facilitative provision is more restrictive as to its use as compared to an IFA.

117. These important differences would be largely lost if the proposals advanced by the ACTU were adopted. Further, having regard to the fundamental differences in the nature of an IFA *vis-à-vis* a facilitative provision, the imposition of the various procedural requirements applying to the implementation of IFAs are not warranted in respect of facilitative provisions.

118. *Second*, the ACTU's proposals do not *'clarify'* the operation of facilitative provisions. To that end, its submission mischaracterises the nature of the changes proposed. They would in fact result in substantive changes.

119. *Third,* as to the ACTU's proposal to incorporate the principles set out in the *Award Simplification Decision*[62] into modern awards, this is simply unworkable. The principles may be matters that guide the Commission when considering proposals to insert or vary facilitative provisions in modern awards. However, it also goes without saying that an award term cannot confer the Commission with powers to make new safeguards, as suggested by the ACTU.

120. *Fourth*, the introduction of a *'better off overall test'* into facilitative provisions is neither necessary nor warranted. Facilitative provisions are a common and longstanding feature of modern awards. There is no material before the Commission which indicates that existing facilitative provisions no longer meet the MAO or that such provisions are being improperly or unfairly used. Critically, facilitative provisions by their very nature operate by agreement between an employer and employee. This necessarily provides an important safeguard.

121. *Fifth*, facilitative provisions are in fact commonly used as a mechanism to deliver flexibilities sought by employees, including those seeking to balance their work and caring commitments (for example, electing to have time off in lieu of receiving overtime pay). Introducing a better off overall test would overcomplicate, overregulate, and in turn, deter employers (particularly smaller

[62] Print P7500.

employers with limited resources and expertise) from entering into such arrangements. This would be a perverse outcome and would be contrary to the objective of this aspect of the Review.

122. *Sixth,* facilitative provisions are also utilised to deliver necessary flexibilities to employers. There is nothing illegitimate or inherently unfair about this. The introduction of a *'better off overall'* test may significantly limit the circumstances in which the flexibility currently afforded by those provisions can be utilised. No doubt that is what is intended by the ACTU. In our submission, such an outcome would be plainly unfair and unreasonable. Generally, facilitative provisions permit only limited scope to vary the effect of a small number of award terms and those facilitative provisions themselves must satisfy the MAO, which in turn requires a consideration of the impact that the provision would have on employees, in various ways.

123. *Seventh*, it is difficult to respond to the proposition that there should be appropriate safeguards, having regard to the *'nature of the provisions sought and the circumstances of the particular industry'* in the abstract.[63] No specific proposals have been advanced.

124. *Eighth*, as to the ACTU's proposition that existing facilitative provisions may not take into account the circumstances of the industry covered by the award and the history of any existing facilitative provisions, this should not be accepted. Not all modern awards contain facilitative provisions. Of those modern awards that do, the facilitative provisions substantively differ in respect of which provisions in the award can be the subject of a facilitative arrangement, the limits or parameters of such arrangements, as well as the process by which those arrangements can be reached. This suggests that facilitative provisions have been tailored to meet the particular needs and circumstances of an industry.

125. *Ninth,* the proposal that unions should be notified of an intention to utilise a facilitative provision and provided with a reasonable opportunity to participate in *'negotiations'* reflects a shameless attempt to increase union influence at the

[63] ACTU Submission at page 32.

enterprise level. The proposal would apply even where an employee did not seek the union's involvement. It should not be entertained.

126. The dispute settlement procedure already provides a mechanism for dealing with any circumstances in which an employee disputes the application of a facilitative clause. The model term specifically provides that an employee can seek to be represented in the context of such a dispute. This would include representation by a union.

127. *Tenth,* as to the proposal to introduce a monitoring and review process, such a term is not necessary. Parties to a facilitative arrangement can assess the workability of the arrangement at any time.

128. *Lastly,* as to the ACTU's proposition that a facilitative arrangement be subject to scrutiny by the Commission, for example, through regular reports regarding their use; facilitative arrangements can already be the subject of a dispute under the dispute resolution clause of a modern award, whereby parties can agree for the Commission to arbitrate the dispute. In our view, this already provides an appropriate and sufficient level of Commission '*scrutiny'*.

129. To the extent that the ACTU requests that the Commission undertake the same reporting that the General Manager of the Commission currently undertakes in respect of IFAs, we submit that:

    (a) It is unclear how this reporting requirement could be introduced into a modern award. The requirement for the General Manager of the Commission to report on IFAs is found at s.653 of the Act.

    (b) In the General Manager's last report on IFAs, it was observed that '*the capacity of the Commission to accurately assess both the extent and terms of IFAs is limited as IFAs are not lodged with or assessed by the Commission or any agency and no administrative data source exists from*

which to report'.[64] This is also likely to be the case if reporting was undertaken for facilitative arrangements.

[64] FWC, *General Manager's report into individual flexibility arrangements under section 653 of the Fair Work Act 2009* (*2018 to 2021)*, page 8 <https://www.fwc.gov.au/documents/reporting/gm-ifa-2021.pdf> (accessed 25 March 2024).

8. QUESTION 4 – WORKING FROM HOME

130. Question 4 is as follows:

> Are there any specific variations needed in modern awards regarding working from home arrangements that are necessary to ensure they continue to meet the modern awards objective?

ACTU ([74] – [79] and Recommendation 10)

131. The ACTU makes the following recommendation in respect of working from home:

> **Recommendation 10**
>
> 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 right should be available to all workers, regardless of their length of service or reason for requesting WFH arrangements. Employers should only be permitted to refuse a request on reasonable grounds. There should be clear, objective and industry-specific criteria in each relevant award to determine the reasonableness of a refusal.[65]

132. We do not consider that an award term of the nature described by the ACTU is capable of inclusion in an award, because it would not be *about* any of the matters described at s.139(1) of the Act; nor could it be said to satisfy s.142 of the Act.

133. Ai Group's proposal as to how modern awards should be varied to facilitate arrangements that involve working from home, as set out at Chapter 8 of our March Submission, should instead be adopted. The variations proposed would remove barriers that might otherwise prevent working arrangements from home. Further, they would be permitted by s.139(1)(c) of the Act, because they would relate to *'arrangements for when work is performed'*.

[65] ACTU Submission at page 34.

134. We also note that many employees already have a right to request to work from home, pursuant to s.65 of the Act. Notably, a note following s.65(1) expressly contemplates that an employee's request may seek a change in their *'location of work'*.

135. The ASU Submission[66] and the ANMF Submission[67] advance similar proposals. We refer to the submissions above in response.

ACCI ([89] – [136] and [140] – [155]) and ABI (6] – [14], [23] – [63] and [66] – [80])

136. ACCI's and ABI's proposals replicate elements of the March Submission filed by Ai Group[68], as well as our earlier submission filed in the MAEU stream of the review.[69]

137. Whilst we support its proposals, they do not, in our view, go far enough. The Commission should instead adopt Ai Group's proposal in the March Submission.

[66] ASU Submission at [41] – [42]

[67] ANMF Submission at [49].

[68] March Submission at [131] – [147].

[69] Ai Group submission dated 22 December 2023 at [190] – [200] and [353] – [361].

9. QUESTION 5 – A RIGHT TO DISCONNECT

138. Question 5 is as follows:

> Are there any specific variations needed in modern awards regarding a right to disconnect that are necessary to ensure they continue to meet the modern awards objective?

139. Question 5 was not addressed by most parties in their written submissions on the basis that it has been carved out of this stream of the Review and the right to disconnect would soon be the subject of separate proceedings concerning a model term.[70] We note that since initial submissions were filed, the Commission has now commenced these separate proceedings.[71]

[70] See, for example, ACTU Submission at [80] and March Submission at [157] – [159].

[71] *Variation of modern awards to include a right to disconnect term* [2024] FWC 649.

10. QUESTION 6 – MINIMUM PAYMENT PERIODS

140. Question 6 is as follows:

> Are there any specific variations to the minimum payment periods for part-time employees in modern awards that are necessary to ensure they continue to meet the modern awards objective?

141. Although question 6 relates only to part-time employees, many of the submissions advanced by interested parties relate to minimum engagement periods as they apply to part-time, casual and full-time employees. We have sought to distinguish where this occurs in the submissions that follow.

ACTU ([81] – [85] and Recommendation 11)

142. In Recommendation 11, the ACTU submitted that modern awards be varied in a number of respects, including:

(a) To provide for a four hour minimum engagement period as a baseline entitlement for all employees (full-time, part-time and casual) excluding paid breaks, unless a more generous entitlement already exists in an award and subject to any other position advanced by the ACTU's affiliates; and

(b) To ensure minimum payment obligations apply when a casual employee's rostered shift is cancelled; and

(c) To provide for minimum engagements on a weekly basis for part-time employees.[72]

143. We deal with the claims at paragraphs (a) and (b) in the submissions that follow. We have dealt with the claim at paragraph (c) in response to question 1.

[72] ACTU Submission at page 36.

Four Hour Minimum Engagement Period

144. We oppose the ACTU's proposal to introduce a uniform four hour minimum engagement period for all categories of employees in all awards. The Commission should not endorse the proposition that four hours is an appropriate duration for all minimum engagement periods across the award system.

145. This is not the first time the ACTU has advanced a claim of this nature. In the 4 yearly review, the ACTU sought a four-hour minimum engagement period for all casual and part-time employees across the awards system. In ultimately rejecting the ACTU's claim, the Full Bench stated as follows in its decision ***(Casual and Part-time Common Issues Decision)*** regarding the establishment of uniform minimum engagement periods (emphasis added):

> **[403]** …[I]n establishing award minimum engagement requirements, there are a number of important countervailing considerations that need to be taken into account:
>
> - longer minimum engagement periods may prejudice those persons who wish to and can only work for short periods of time because of family, study or other commitments, or because they have a disability;
>
> - the need for and length of a minimum engagement period may vary from industry to industry, having regard to differences such as in rostering practices and whether there are broken shifts;
>
> - an excessive minimum engagement period may cause employers to determine that it is not commercially viable to offer casual engagements or part-time work, which may prejudice those who desire or need such work; and
>
> - a minimum daily engagement period for part-time employees might not need to be as long as for casual employees, because part-time employees are likely to enjoy the greater security of a guaranteed number of weekly hours of work.
>
> **[404]** Modern awards contain a range of different minimum daily engagement periods for casual and part-time employees, and some contain no minimum at all, such as the VMRSR Award. These provisions generally derive from provisions in pre-reform awards which were in most cases likely formulated by the agreement of the award parties. It can be presumed that in doing so the parties took into account the circumstances of the industries in which they operated that prevailed at the time, but beyond this it is not possible to generalise about the basis upon which such provisions were struck. In particular modern awards, it is clear that that the minimum engagement periods were intended to meet the peculiar circumstances of special types of work or workers. For example, in clause 10.5(d) of the Bus Award, the minimum engagement period for casuals is 3 hours, but for school bus drivers it is 2 hours per engagement; and in clause 12.2 of the Higher Education Award the minimum engagement period for casuals is 3

hours, except that for undergraduate students who are attending the university as a student on the day they work, or for employees with a primary occupation elsewhere, it is one hour.

[405] The ACTU's claim seeks to replace the current variegated situations with a uniform standard of a 4 hour minimum engagement for all part-time and casual employees. It advances that claim on the basis that it would enhance the job and income security of casual employees and part-time employees. However we do not consider that a standard provision of this nature would achieve that objective, because the evidence demonstrates that in respect of a number of awards the imposition of a 4 hour minimum would probably have the opposite effect and may lead in many cases to a loss of work opportunities and working hours for casual and part-time employees which currently exist. It is not necessary to refer to all of the evidence in this respect; the following examples will suffice:

(1) The very short minimum engagement period for student casuals in clause 12.2 of the Higher Education Award to which we have just referred was evidently intended to allow such casuals to take advantage of casual employment opportunities on campus while attending to other study commitments there. The evidence of Mr Ward, Mr Gladigau and Mr Greedy for example demonstrated that much of the casual work in which employed students were employed did not require 4 hours' work, and for that reason suited students' commitments and timetables. An increase to a standard 4 hour minimum carries with it the risk that either the university would cease to be able to offer such work to students because the cost would be prohibitive, or students would not be able to perform it because they could not fit it into their other study commitments.

(2) For school-aged students, the uniform extension of a 4 hour minimum would also be destructive of work opportunities. Mr Blanchard in the road transport industry, Ms King in the hospitality industry and Ms Meilak in the automotive industry gave evidence that they used school students for short engagements to perform basic tasks and gain an introduction to work in their industries, but that a 4 hour minimum engagement would prevent this because there was not sufficient work to perform to support it. In Ms Meilak's case, her automotive business employed school students after school finished, but they could not be employed for 4 hours after school because the business closed before then.

(3) Some adults also use casual engagements shorter than 4 hours to suit their family commitments and other personal circumstances. For example Ms Golisano in the hairdressing industry referred to engaging casuals in the evening who had caring responsibilities during the day, who could not come to work early enough in the afternoon to work 4 hours before her salon closed at 9.00 pm; Mr Brown referred to employing parents and university students in his hotel who would have difficulty making themselves available for 4 hour shifts; and Ms Brannelly and Mr Mondo in the childcare industry referred to engaging casuals for short shifts which allowed them to fit paid work around their study timetables. A 4 hour minimum engagement requirement might lead to such casuals not being able to be employed in the future.

(4) There was evidence generally that a 4 hour minimum would not necessarily lead to additional work and income for casual employees, but that the work

> would be redistributed to other non-casual employees to avoid the impost and the number of casuals employed would be reduced.
>
> …
>
> **[407]** While a 4 hour minimum daily engagement might under some awards represent an appropriate balancing of the competing considerations to which have earlier referred, we do not consider that it can be adopted on the across-the-board basis proposed by the ACTU. That would not in all awards meet the modern awards objective in s.134, because we consider that it might have the counter-productive result of reducing workforce participation and social inclusion, and also because under some awards it may inhibit flexible modern work practices and the efficient and productive performance of work. The ACTU's claim for a standard 4 hour minimum engagement for casual and part-time employees is therefore rejected.[73]

146. For the reasons identified in the above extract, it would be inappropriate for the Commission to entertain the ACTU's submission to establish a blanket four-hour minimum engagement period. Relevantly, the ACTU has provided no rationale for why an industry-specific approach should be abandoned.

147. Indeed, a Full Bench of the Commission has found, in the context of the SCHCDS Award, that it was not appropriate to take a uniform approach to the duration of minimum engagement periods *within the same award*.[74] Rather, it decided to implement different minimum engagement periods for different sectors covered by it. The Commission again emphasised the importance of carefully '*balancing the relevant considerations*' in considering the claim in that case.[75]

148. The ACTU's submissions also ignore the '*countervailing considerations*' identified by the Full Bench at [403] of the extract above. Plainly, extending minimum engagement periods can have various adverse implications for employers *and employees,* including those that were there articulated by the Commission. This includes depriving employees with caring responsibilities from working short shifts, in accordance with their availability. Further, the rationale for minimum engagement periods for part-time employees is clearly of lesser

[73] *Four yearly review of modern awards* [2017] FWCFB 3541.

[74] *Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 2383 at [360].

[75] *Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 2383 at [355].

relevance where the applicable award requires that their hours are to be arranged by agreement.

149. As part of Recommendation 11, the ACTU also seeks to extend its proposed four-hour minimum engagement period to full-time employees across the award system. Ai Group opposes this. Currently, modern awards rarely provide for minimum engagement periods for full-time employees. For example, only three of the 25 modern awards considered in the Paper do so.[76]

150. As part of its application regarding the minimum engagement periods in the SCHCDS Award referred to above, the HSU sought to extend a three-hour minimum engagement period to full-time employees. This was ultimately rejected by the Full Bench, which found that because of a number of other features of the award, there was a '*very remote*' possibility that full-time employees would perform unreasonably short shifts.[77] Indeed, the Full Bench noted that the award required full-time employees to be guaranteed 38 hours' work, which it said '*eliminates or at least ameliorates any adverse impact*' that may arise from not having a minimum engagement period.[78] The same can be said of other modern awards, which generally regulate full-time employment in a relevantly similar way.

<u>Casual Shift Cancelled</u>

151. The final component of Recommendation 11 is that a minimum payment period should apply *'where the rostered shift of a casual is cancelled'*.[79] The ACTU has not advanced a specific basis for this proposal.

152. Ai Group opposes this claim.

[76] The Paper at pages 77 – 81.

[77] *Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 2383 at [328] – [329].

[78] *Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 2383 at [329].

[79] ACTU Submission at page 36.

153. The fundamental rationale for minimum payment periods was articulated by a Full Bench of the Commission during the 4 yearly review of modern awards: (emphasis added)

> **[399]** Minimum engagement periods in awards have developed in an ad hoc fashion rather than having any clear founding in a set of general principles. However their fundamental rationale has essentially been to ensure that the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like. An employment arrangement may become exploitative if the income provided for the employee's labour is, because of very short engagement periods, rendered negligible by the time and cost required to attend the employment. Minimum engagement periods are also important in respect of the incentives for persons to enter the labour market to take advantage of casual and part-time employment opportunities (and thus engage the consideration in paragraph (c) of the modern awards objective in s.134).[80]

154. That is, the purpose of minimum engagement periods is to ensure employees are sufficiently compensated *'for each attendance at the workplace to justify the expense and inconvenience associated with that attendance'*. This expense and inconvenience do not arise where the employee is not required to attend the workplace because their shift has been cancelled.

155. The ACTU's submission also ignores the proposition that casual employees' shifts may be cancelled for a variety of reasons, including because an employee does not attend work. Further, an inherent characteristic of casual employment is that an employer has not made a firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person.[81] Thus, an employer should not be penalised, through a requirement to make a minimum payment, where they seek to cancel a casual employee's shift. This would undermine one of the very flexibilities required by many employers who rely on casual labour and impose unjustifiable employment costs.

156. In light of these reasons, it would be inappropriate to require a minimum payment to be made to casual employees when their shift is cancelled. The Commission should therefore not adopt the proposal.

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[80] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [399].

[81] Section 15A(1)(a) of the Act.

SDA ([186] – [193] and Recommendations 17 – 18)

157. Recommendations 17 and 18 in the SDA Submission cover the same ground as the ACTU's Recommendation 11 set out above as it relates to a four-hour minimum engagement period and a minimum engagement for full-time employees respectively. For the reasons set out above at paragraphs [144] – [150], we oppose these submissions.

158. It is also relevant that a notable proportion of employees covered by the FF Award, GRIA and Vehicle Award are students, who have limited availability due to their study commitments. As acknowledged by the Commission in the *Casual and Part-time Common Issues Decision*, this is a factor that weighs against lengthy minimum engagement periods. The same can be said of employees with caring responsibilities.

159. Further, employers covered by the FF Award and GRIA commonly have a need for short periods of work to cover peak periods. For example, in the fast food sector, employers often require additional labour to cover meal times, for approximately 1 – 2 hours at a time. In that context, the existing minimum engagement periods are in fact excessively long and overly restrictive. Our proposal to permit minimum engagement periods to be reduced by agreement is intended to address circumstances of this nature.[82]

UWU ([15] – [17], [19(a)], [20] – [24])

160. The UWU has proposed that awards be varied to ensure that minimum payment periods are at least four hours for part-time and casual employees.[83] We oppose this submission for the reasons outlined at [144] – [150] above. We also observe that the purported concerns raised by the UWU at [22] are not relevant. Put another way, increasing the minimum payment periods would not necessarily address the issues raised.

[82] March Submission at [163] – [169].

[83] UWU Submission at [19(a)].

161. At paragraph [24] of the UWU Submission, it makes various complaints about the operation of clause 13.5 of the *Cleaning Services Award 2020* (**Cleaning Award**), however it does not advance any specific proposals to remedy them. If pressed, these matters would need to be the subject of detailed evidence and consideration of the manner in which the relevant provision is applying in practice. Absent such material, we contest these propositions.

162. The UWU goes on to argue that clause 13.5 should be varied to require an employer to provide all relevant information regarding the '*total cleaning area*' if requested to do so by a part-time or casual employee.[84]

163. Ai Group opposes this proposal. It is not clear that the UWU's proposed variation is necessary. Although it is not explicitly provided for in the award, it is open to an employee to nonetheless request this information from their employer if they wish. The UWU Submission does not establish that employers are systematically declining to provide this information, where requested. Where an employee disputes whether the appropriate minimum engagement period has been applied to them, it is open to them to initiate a dispute pursuant to the dispute settlement procedure prescribed by the award.[85]

HSU ([30] – [32])

164. The HSU has indicated its intention to consult further with its members regarding the absence of a minimum engagement period for part-time employees in the HPSS Award, and potentially address it at a later stage.[86] Ai Group may seek to be heard in response to any specific proposal put forward by the HSU in this regard.

165. The HSU also supports proposals advanced elsewhere in the Review which would extend the three hour minimum engagement period under the SCHCDS Award to social and community services workers undertaking disability services work, such that all part-time and casual social and community services (**SACS**)

[84] UWU Submission at [24], Appendix A item 4, page 14.

[85] Clause 30 of the Cleaning Award.

[86] HSU Submission at [31].

employees would have the benefit of a three hour minimum engagement.[87] It appears that the HSU is here referring to the submission made by the Australian Workforce Compliance Council (**AWCC**) as part of the MAEU stream of the Review.[88]

166. We strongly oppose this proposed variation. The AWCC claim was advanced on the basis of difficulties associated with automating the application of the clause. No further rationale supporting this proposal is advanced by the HSU.

167. Moreover, the minimum engagement periods in the SCHCDS Award were the subject of very recent consideration by a Full Bench of the Commission, involving detailed evidence and submissions from employer and union parties.[89] The Commission specifically decided that SACS employees undertaking disability work would be entitled to a minimum engagement period of two hours. Any reassessment of this issue would again require detailed consideration and evidence, including in respect of the nature of the work performed by such employees. Further, the appropriate length of the minimum engagement period is intrinsically linked to other entitlements prescribed by the award, including in respect of broken shifts. Thus, a more wholistic consideration of the operation of such provisions would also be required.

CPSU ([41] – [44])

168. In response to question 6, the CPSU has proposed that minimum engagement periods for team meetings should be extended to four hours and has proposed a draft clause for inclusion in the SCHCDS Award.[90] We oppose the proposed provision in its entirety.

169. The proposed clause goes well beyond the issue of minimum engagement periods. Instead, it seeks to regulate the conduct of team meetings, including who is permitted and required to attend the meetings, the frequency of meetings,

[87] HSU Submission at [32].

[88] Australian Workforce Compliance Council Submission dated 2 February 2024 at page 85.

[89] *Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 2383.

[90] CPSU Submission at [41] – [44] and Annexure A on page 14.

meeting duration and the setting of an agenda. Plainly, as a matter of merit, it is not appropriate that these matters are prescribed in the award. Rather, they are best determined at the enterprise level, according to the particular circumstances of the organisation and its employees. Moreover, it would appear that the inclusion of such a term in an award is not permitted by s.139 of the Act.

170. In relation to the issue of the minimum engagement period applying to team meetings; the CPSU argues that it should be extended to four hours[91], however the draft clause proposed at Annexure A refers to three hours.

171. We would oppose any extension of the existing minimum engagement periods applying to team meetings. Typically, team meetings are shorter in duration than alleged by the CPSU. The imposition of a longer minimum engagement period would obviously impose additional costs on employers and may in fact deter employers from scheduling such meetings. In any event, if a meeting exceeds the minimum engagement periods (e.g. it runs for four hours), employees required to attend would be entitled to be paid for this. Minimum engagement periods cast a *floor*, not a *ceiling*.

172. To the extent that the CPSU Submission refers to travel time for employees to attend team meetings, we have addressed this issue below in response to question 12.[92]

ANMF ([50] – [54])

173. The ANMF submits that the *Nurses Award 2020* (**Nurses Award**) should be varied to provide for a minimum engagement of four hours for part-time and casual employees. [93] The award currently does not contain a minimum engagement term for part-time employees and provides for a two hour period for casual employees.[94]

[91] CPSU Submission at [41].

[92] CPSU Submission at [41].

[93] ANMF Submission a [53] – [54].

[94] Clause 11.3 of the Nurses Award.

174. We oppose the ANMF's claim for the reasons set out at paragraphs [144] – [150] of this submission.

CFW ([11] – [12])

175. CFW submits that '*short engagement periods, such as the two-hour minimum engagement [in the SCHCDS Award], enable exploitation*'.[95] This is a serious assertion that should not be accepted in the absence of evidence. We also refer to our earlier submissions in relation to the SCHCDS Award, in response to the HSU's claim.

176. The CFW also submits that '*minimum engagement periods in all awards be 4 hours*'.[96] We oppose this for the reasons set out at [144] – [150] of this submission.

[95] CFW Submission at [11].

[96] CFW Submission at [12].

11. QUESTION 7 – SPAN OF HOURS

177. Question 7 is as follows:

> Are there any specific variations to span of hours provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

The ACTU ([86] – [92] and Recommendation 12)

178. In response to question 7, the ACTU proposes as part of Recommendation 12 that:

(a) Awards which do not currently prescribe a span of hours, should be varied to include one.

(b) All awards which currently contain a span that extends beyond '*standard weekday daytime hours*' should be reviewed with regard to the impact on care, security of hours, rostering, and gender equality.

(c) Awards which have an '*expansive'* span of hours should be reviewed to determine if they appropriately recognise and compensate for rostering outside of standard weekday daytime hours, e.g. with appropriate shift rates, allowances, and leave.

179. The ACTU also advances two key propositions at [86] - [92] of its submissions:

(a) The span of hours has a role in determining when an employee is a shift worker and how much annual leave they are entitled to. It has a material impact on an employee's pay and entitlements, as well as their work-life balance.

(b) In awards with no span or a very broad span of hours, employees have very little control over being scheduled to work outside of standard weekday, daytime hours and also receive much lower compensation when they work those hours as ordinary hours.

180. We respond as follows.

181. *First*, the ACTU's proposal to introduce a span of hours into awards which do not currently contain a span would, quite simply, constitute a radical change. The absence of a span of hours in certain modern awards is, in large part, due to the absence of '*standard'* operating hours. In industries where no span of hours is prescribed by the relevant award, employers generally operate seven days a week and at various times of the day, evening, and night. The absence of a span of hours in such awards is simply the product of the nature of services and operations provided by employers covered by these awards.

182. For example, in the fast food, hospitality and cleaning industries, many businesses operate 24 hours a day, seven days a week due to client demand. In other instances, such as the *Miscellaneous Award 2020*, the absence of a span is likely because employers and employees covered by it may be in a broad range of industries and sectors, with varying needs and operational demands.

183. *Second,* any proposal to introduce a span of hours into an award which does not currently contain one, must be considered on an award-by-award basis. The significant financial impacts on employers resulting from the introduction or reduction of a span cannot be overlooked, as variations of this kind would have profound and adverse impacts on a vast number of longstanding practices, operations and business models, which may no longer be viable or sustainable. This could also have severe ramifications on the performance and competitiveness of key sectors and industries (such as those aforementioned) within the national economy.[97]

184. *Third,* the proposal for the Commission to review awards which contain a span that extends beyond '*standard'* weekday daytime hours and that are '*expansive'*, should not be entertained. The ACTU submits that such a review should have regard to the impact of the existing span of hours on care, security of hours, rostering, gender equality and appropriate compensation. The Commission is currently undertaking a review of such matters and parties, including the ACTU, have been provided with the opportunity to file material of the kind that it has

[97] Section 134(1)(h) of the Act.

itself contemplated. The ACTU has only referred to the SDA Submission which alleges a purported correlation between the span of hours and awards that are male and female dominated – we deal with this further below.

185. The Commission should not undertake a further and separate review to consider the span of hours in modern awards. This is particularly so given that the ACTU has not taken up the current opportunity provided to it and has not even sought to identify which awards purportedly contain a span that goes beyond the '*standard'* hours of work or that it considers to be '*expansive*' (presumably because there is no '*standard'* span of hours that can appropriately be identified for all awards).

186. Moreover, as earlier submitted, any proposed variations to awards, including the introduction or reduction of a span of hours, must necessarily be considered on an award-by-award basis. To that end, a broad-brushed *'review'* of span of hours provisions would not be appropriate. Further and in any event, parties are at liberty to bring an application seeking variations to span of hours provisions in specific awards at any time. Such applications would be a more appropriate vehicle for dealing with the relevant issues.

187. *Fourth,* any consideration given to the span of hours in an award should not be limited to the factors enumerated by the ACTU (i.e. the impact of the existing span of hours on care, security of hours, rostering, gender equality and appropriate compensation). An assessment as to whether an award achieves the MAO necessarily involves a consideration of a broad range of matters, including those listed at s.134(1) of the Act. They include the impact on productivity, efficiency and employment costs. The matters raised by the ACTU should not be given primacy. Rather, they are but some of a range of factors that may be taken into account.

188. *Fifth*, the ACTU has rightly identified that any variation to the span of hours in awards will have various impacts on an employee's pay and entitlements. The ACTU has however, overlooked the various *perverse* consequences that would flow if a span of hours was to be reduced or if one were to be introduced into an award. In particular, any work outside those parameters would constitute

overtime and thus, employees would not be entitled to the mandatory superannuation guarantee in respect of overtime earnings, nor would they accrue leave or be entitled to take leave in respect of overtime hours.

189. *Sixth,* the introduction of a span of hours or a reduction of the existing span of hours would have various adverse effects for employers, including significant uncertainty for employers as to whether they will be able to arrange labour in a way that enables them to viably conduct their operations. This is because employees cannot be *required* to work overtime outside the span of hours and there would be serious cost implications flowing from the performance of such overtime.

190. Employers would need to assess whether they will need to significantly reduce or even cease operations outside of the span entirely. This would also result in adverse ramifications for employees, including reduced hours of work, reduced opportunities to be provided with full-time work, reduced guaranteed hours for part-time employees and potential redundancies.

191. *Seventh,* as to the proposition that employees have little control over being scheduled to work, it is trite to observe that the manner in which work is performed is principally a matter for the employer. Awards place various fetters on the exercise of that prerogative, including by prescribing the number of shifts that an employer can roster over certain periods, the maximum length of each shift, rest breaks between shifts, and requirements to notify and consult employees about changes to their regular roster. However, any notion that employees should have absolute *'control'* over when they are required to work is, frankly, fanciful and would render it impossible for businesses to operate efficiently and productively – matters that are essential for their success (and in turn, their ability to engage employees in permanent and ongoing employment).

192. *Eighth,* the ACTU submits that employees receive lower compensation for working outside of '*standard weekday, daytime hours*'. This is an overly simplistic and generalised submission. Awards commonly provide various entitlements to employees that work outside of '*standard'* hours. For example, the FF Award and

the GRIA provide significant penalty rates for ordinary hours of work performed on weekends and at various times of the day, including during evenings.[98]

The SDA ([194] – [226] and Recommendations 20 – 21)

193. There is a significant degree of overlap between the ACTU Submission and the SDA Submission, including Recommendations 20 and 21 proposed by the SDA which substantively mirror Recommendation 12 proposed by the ACTU.

194. To the extent that the SDA Submission advances substantively different propositions or proposals to that of the ACTU, we have identified such matters and responded to them below:

    (a) The SDA advances various factual assertions by individual unnamed employees concerning alleged rostering practices, namely:

        (i) The purported use of '*model'* rosters that include a certain number of hours that must be worked on evenings and weekends. It is alleged that this practice is a form of indirect discrimination against working carers and is a result of an expansive span of hours.

        (ii) A broad or non-existent span combined with frequent '*roster resets*' within the computerised systems resulting in roster uncertainty.

        (iii) Requiring workers on lower classifications to work on weekends and evenings because employers argue that this is '*fairer'* to everyone, even though it does not always match the workers' caring needs. Employers push roster changes knowing the worker cannot work the hours because of carer responsibilities and argues that if they work in the industry, they should be able to work across the full span of hours.

[98] Clause 21 of the FF Award and clause 22 of the GRIA.

(iv) Employees are *'encouraged'* to waive rights to roster protection. Where a majority of employees have waived such rights, there is pressure on individuals by management, in some cases to meet a KPI or to allow the roster system to operate with less restrictions.

(b) The various implications of employees working on weekends and nights as found in a study published in the Journal of Marriage and Family.[99]

(c) Male dominated awards are more likely to have a narrower spread of hours than female dominated awards, which places a restriction and protection against being rostered to work evenings and/or weekends as ordinary hours. For evening and weekend workers in feminised industries like retail, fast food, pharmacy, hairdressing and beauty, the expansive or non-existent span of hours results in unfair and unbalanced control by employers over hours of work and no reward (except for penalty rates), or recognition of working shift schedules that are '*nonstandard'*, that male workers have been compensated for, for more than a hundred years.

195. We advance the following submissions in response.

196. *First,* the various factual assertions advanced as part of the SDA Submission are not matters that should be given any weight by the Commission. They are premised upon individual and unverified employee accounts of the purported rostering practices of individual employers. Due to the manner in which they have been advanced, they cannot properly be interrogated by respondent parties.

197. *Second,* as to the implications of working on weekends and nights:

(a) A reduction to the span of hours would not entirely prevent an employer from rostering an employee to work beyond the span. Employers can reasonably request employees to work overtime and employees can refuse only if the additional hours are unreasonable.

[99] Laß, I. and Wooden M. (2022) 'Weekend work and work-family conflict: Evidence from Australian panel data', *Journal of Marriage and Family*, vol. 84(1).

(b) Further, the increased costs associated with overtime payments would foreseeably result in employers finding that it is no longer viable to operate outside of the prescribed span (or at the very least, that they need to reduce the extent of their operations outside the span). This may adversely impact employees who want to work flexibly (including outside of the span or across a wider span), including because of their caring responsibilities and arrangements. Indeed in some cases, working outside of the span may be the only arrangement that is feasible for an employee with certain caring responsibilities.

(c) Generally, awards prescribe penalty rates for working on weekends and / or at night. Thus, employees are appropriately compensated for working at unsocial times.

198. *Third*, as to the SDA's proposition that male dominated awards have a disparately shorter span of hours as compared to female dominated awards which have a larger span of hours; it is not clear that the differences in the span of hours is due to the '*undervaluation of female dominated work*'. Rather, the difference in the span of hours can be explained by the nature of the operations or services provided in a particular industry.

199. For example, the building, storage services, electrical contacting, manufacturing, and plumbing industries, which the SDA identifies as being covered by *'male dominated awards'*, are industries which do not tend to require extended operating times, as compared to the fast food, retail, hair and beauty, pharmacy, hospitality, cleaning, disability and aged care industries, which are identified as being covered by '*female dominated awards*'. Unsurprisingly, the latter group of industries need to operate for extended hours for various reasons, including customer demand and the need to provide essential services.

UWU ([18], [19](c), and [26])

200. The UWU advances three key propositions:

(a) Excessive hours of work performed through an extended span of hours affects a worker's ability to meet their caring responsibilities, as they are required to be away from home for extended periods of time without, in many cases, fair compensation.

(b) The span of hours in a modern award should be reasonable.

(c) The long span of hours for home care workers in the SCHCDS Award is of concern, in particular the 6.00 am - 8.00 pm span, which applies Monday to Sunday. Given the prevalence of broken shifts in this industry and low minimum engagement periods, a worker may be working intermittently across the span of hours, up to 14 hours, yet may only be paid a portion of those hours.

201. We respond as follows.

202. *First*, it is unclear how an extended span of hours necessarily results in an employee performing excessive hours of work. The span of hours simply prescribes when ordinary hours may be performed, as opposed to requiring employees to work in excess of or across the entire span.

203. Further, many awards also contain a maximum number of hours that can be performed each day, which limits the number of hours that can be worked within a span. For example, the SCHCDS Award in clause 25.1(a) provides that a shift cannot exceed 8 hours, unless the employee and employer agree to extend this to 10 hours under clause 25.1(b). Put simply, the fact that the span is '*up to 14 hours*' does not cause employees to work 14 hours.

204. *Second*, there is no material before the Commission that indicates that the span of hours in modern awards is not reasonable. In any event, we maintain that the existing span of hours in modern awards remains fair and relevant.[100]

205. We also note that the UWU has not advanced specific proposals to vary the span of hours in any award. Accordingly, it is impracticable to respond to its generalised submission any further.

206. *Third*, the broken shift and minimum engagement periods in the SCHCDS Award were recently considered by a Full Bench as part of the 4 yearly review.[101] Having considered numerous union claims, extensive submissions and evidence, as well as multiple days of hearings, the Full Bench determined to introduce new and increased minimum payment periods, and significant new restrictions on the performance of broken shifts (including payment of a broken shift allowance). In this regard, the minimum payment periods and broken shift provisions in the SCHCDS Award, already provide sufficient and adequate compensation for the disutility associated with broken shifts. Further, clause 25.6(f) of the SCHCDS Award also provides that the span of hours is limited to 12 hours where a broken shift is performed. Where work is performed beyond that span, employees are generously compensated at double time.

HSU ([33] – [42])

207. The HSU advances the following key propositions:

    (a) Employers usually expect employees to be available during the span of hours and that HSU members regularly report this.

    (b) Employers can (and do) claim their operations are '*private medical practices*' to avoid paying shift penalties during extended operating hours under the HPSS Award.

[100] Section 134(1) of the Act.

[101] *4 yearly review of modern awards — Social, Community, Home Care and Disability Services Industry Award* [2021] FWCFB 5641.

(c) Despite the Aged Care Award and the SCHCDS Award both covering 24/7 operations, the difference in the span of hours between the two awards means there is inconsistency in the way employees are compensated for working unsociable and non-family friendly hours.

(d) The span of hours provisions in the HPSS Award may be directly contrasted with other awards covering the health sector and apply to 24/7 work environments. This includes the *Medical Practitioners Award 2020* (**MP Award**) which provides a span of hours of 6.00 am to 6.00 pm Monday to Friday for medical practitioners and the Nurses Award which provides a span of hours of 6.00 am to 6.00 pm Monday to Friday.

(e) In the HPSS Award, workers in a 7-day private medical imaging practice who work on Saturdays or Sundays are entitled to lower weekend penalty rates rather than overtime rates, as a result of the span of hours provisions.

208. We advance the following submissions in reply.

209. *First***,** the HSU advances a number of submissions which seek to identify inconsistencies between awards that are purportedly similar to one another. The span of hours that apply in a particular award cannot simply be compared and aligned to reflect that of another award, even if they cover different parts of the same industry. A consideration of the history of the making of the award, at the very least, is required to determine the genesis of the prescribed span and how this affected the development and making of the award during the Part 10A process. Moreover, it would be necessary to consider the nature of employers' operations covered by the relevant awards and the impact that a varied span would have on them. The HSU has not engages in such analysis and instead seeks to draw upon purported *prima facie* similarities between various awards as a means to identify inconsistency.

210. *Second*, much like the SDA, the HSU makes a number of factual assertions based on unverified individual employee accounts of purported employer expectations and alleged employer practices of misrepresenting its operations as a private medical practice to avoid certain award obligations. They should not

be given any weight. Further, even if such factual matters can be established, they cannot be relied upon to establish matters of broader relevance (e.g. in respect of other awards or industries).

211. *Third*, a span of hours prescribed by an award does not necessarily mean that employees will be required to work (and therefore, be available) for the entirety of that span. There are daily and weekly maximum hours which must also taken into account by an employer when rostering.

212. *Fourth*, as to the differences identified between the span of hours in various awards, a line-by-line assessment of the spans of hours in different awards is of limited assistance. It ignores the inherent differences in the nature of the operations conducted by employers covered by the relevant awards. It also overlooks the proposition that in fact other award terms may be more beneficial in an award with a broader span of hours *vis-à-vis* an award with a shorter span of hours.

213. For example, the Aged Care Award (6.00 am to 6.00 pm, Monday to Friday) and the SCHCDS Award (6.00 am and 8.00 pm, Monday to Sunday), it should be noted that despite having a wider span, the SCHCDS Award provides for other more generous entitlements, for example 25% higher penalties for working on a Sunday at 200%[102] *vis-à-vis* 175%[103] in the Aged Care Award. Moreover, the broader span reflects the nature of home care services provided under the SCHCDS Award, as compared to the work performed in residential aged care facilities under the Aged Care Award.

214. *Fifth*, as to the proposition that employees engaged to work in a seven day private medical imaging practice, are provided with lower weekend penalty rates than the higher overtime rates; it is entirely reasonable that a business which operates seven days a week has a broader span of hours to reflect this. Indeed, the HPSS Award span of hours provisions clearly apply having regard to the nature of the operation provided by the employer.

[102] Clause 26.1 of the SCHCDS Award.

[103] Clause 23.1 of the Aged Care Award.

215. It is also the case that seven day medical imaging practices have an important role in supporting the community, as they provide access to essential health services across the entire week. If the span of hours for an employer operating a seven day practice is reduced to that of a five and a half day practice, the costs associated with paying overtime for work performed on a Saturday afternoon or Sunday[104] may be passed on to patients who have no choice but to access such services on a weekend. Alternatively, employers may simply cease to provide those services on weekends. This would be detrimental to patients and to employees who wish to work at those times, including employees with caring responsibilities, students, etc.

CPSU ([57])

216. The submission advanced by the CPSU is largely the same as that advanced by the UWU. To that extent, we refer to our submissions above.

217. To the extent that the CPSU also relies on grounds of gender equity and seeks to reduce the span of hours in female dominated industry awards to correspond with '*similar provisions*' in male dominated industry awards, we refer to our submissions in reply to the SDA in this section of our submission, above.

218. We also note that the suggested approach of varying the span of hours in modern awards solely on the grounds of gender equality[105] fails to take into account other elements of the modern award objective, including that award terms should be relevant[106] to current industry practices such as the operational need and reasons for having an extended span of hours, and reflective of flexible modern work practices where employees may wish and need to work ordinary hours across a greater span of hours in a particular day.[107]

[104] Clause 13.2(c) of the HPSS Award.

[105] Section 134(1)(ab) of the Act.

[106] Section 134(1) of the Act.

[107] Section 134(1)(d) of the Act.

CFW ([13])

219. The CFW submits that whilst the span of hours differs across awards to reflect the needs of different industries, there are inequities in the compensation provided to employees, including in female dominated industries and where the span of hours is comparatively long.

220. As we have earlier submitted, the span of hours differs across awards because of differences in needs, practices, and the nature of operations and services provided in each industry. The compensation provided to employees and the span of hours that apply in a particular award, cannot simply be compared and aligned to reflect that of another award. The cherry-picking proposed by these moving parties should not be adopted by the Commission.

221. The level of compensation that is provided to employees by an award is derived from a number of factors. The task imposed by ss.134 and 138 of the Act is not as simple as varying one award term to match another, nor is it as simple as varying an award to address a single aspect of the MAO. All of the factors listed in s.134(1) must be considered and assigned appropriate weight.

12. QUESTION 8 – NOTICE OF ROSTERS

222. Question 8 is as follows:

> Noting the Work and Care Senate Committee Recommendation 21 that all employees should have at least 2 weeks' notice of their roster except in exceptional circumstances, are there any specific variations to rostering provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

223. The various claims advanced by the ACTU and unions in response to question 8 reflect a brazen attempt to curtail the prerogative of employers to arrange work in a way that genuinely reflects their operational needs. Many of the proposals are plainly unworkable. Any attempt to adopt them would result in rostering arrangements that are far from optimal and would undeniably compromise (or indeed, wholly undermine) the need to ensure the efficient and productive performance of work.[108] We oppose these claims in the strongest possible terms.

224. We also observe that the unions' submissions generally do not distinguish between full-time, part-time and casual employees. However:

(a) Most award require that agreement is reached with part-time employees about their hours of work on engagement, as well as any subsequent changes to their hours of work. The case for introducing rostering restrictions in respect of part-time employees covered by such awards is, by extension, significantly weaker than might otherwise said to be the case.

(b) The proposition that casual employees be provided with rosters (and indeed, advanced notice of rosters with limited scope to amend them) flies in the face of the very notion of casual employment.

[108] Section 134(1)(d) of the Act.

ACTU ([93] – [102]) and Recommendations 13 & 14)

225. The ACTU's Recommendation 13 contains six proposals regarding rostering. We oppose each of them for the reasons that follow.

226. *First*, the ACTU proposes that '*[a]ll workers have access to regular, predictable patterns and hours of work*'.[109]

227. The proposal is devoid of any consideration of the realities of modern workplaces and business operations. Patterns and hours of work will necessarily be dictated by the nature of an employer's operations and the manner in which the employer seeks to arrange labour to ensure that it is deployed efficiently and productively.[110] Irregular or unpredictable hours of work are an inherent and largely unavoidable characteristic of employers' operations in certain parts of the economy. This reality cannot be ignored, as the ACTU appears to do, by advancing its simplistic and mechanistic proposal.

228. Whilst some awards already provide, in the context of part-time employment, a requirement for reasonably predictable hours of work and agreement on a regular pattern of work prior to the commencement of employment,[111] any proposal to extend this to *'all'* workers (including casual employees) would be plainly unworkable and would have potentially profound implications. In some cases, the employment of employees on that basis would be plainly unsustainable.

229. *Second*, the ACTU proposes that 28 days' notice of rosters is given to employees except in exceptional circumstances (and is expressed as being subject to any affiliate submissions proposing a different timeframe).[112]

230. Ai Group strongly opposes this proposal. It extends far beyond Recommendation 21 of the final report of the Senate Select Committee on Work and Care (**Work and Care Senate Committee**) (**Final Report**) (which is also opposed by Ai

[109] ACTU submission at [99] and Recommendation 13.

[110] See also our March Submission at [180].

[111] See the Paper at [99] and Table 5.

[112] ACTU submission at [99] and Recommendation 13.

Group) and would have a deleterious impact on employers. There are numerous obvious reasons why employers genuinely require greater flexibility when preparing and varying rosters. This includes a need to accommodate fluctuating customer demand, changing staffing requirements, unexpected staff absences and a plethora of other operational challenges.[113]

231. *Third*, the ACTU proposes that roster changes be permitted by mutual agreement only. In the alternative, the ACTU proposes '*there should be 28 days' notice of roster changes for all workers, including casuals (except in exceptional circumstances), and a requirement for employers to genuinely consider employee views about the impact of proposed roster changes, and take the views of the employee, including working carers, into consideration when changing rosters and other work arrangements'*.[114]

232. Ai Group strongly opposes the proposal that roster changes should be permitted my mutual agreement only. It is critical that employers have the ability to unilaterally change rosters to accommodate their operational needs. It is not appropriate that in such cases, they are beholden to the relevant employee(s). For the reasons articulated in our March Submission, awards that contain pre-existing rostering provisions should rather be varied to include a unilateral right for an employer to vary a roster with a short period of notice in the event of unforeseen circumstances.[115]

233. The alternate proposition advanced by the ACTU; that 28 days' notice be provided of roster changes, when coupled with the second recommendation (mentioned above), would in effect mean that an employer does not have any ability to alter rosters. For obvious reasons, this is plainly unfair and unreasonable.

[113] See also our March Submission at [179].

[114] ACTU Submission at [99] and Recommendation 13.

[115] March Submission at [181](b) and [186] – [188].

234. As to the proposed requirement that an employer '*genuinely consider employee views about the impact of proposed roster changes, and take the views of the employee, including working carers, into consideration when changing rosters and other work arrangements'*, such a change is unnecessary in the context of the model consultation clause about changes to regular rosters or hours of work, which already requires an employer to consult employees prior to implementing changes of the prescribed kind.[116] The clause requires that employees' views are taken into account. This would ensure that an employee has an opportunity to be heard in respect of proposed changes that could impact their caring responsibilities.

235. *Fourth*, the ACTU proposes '*[e]mployees have a 'right to say no' to extra hours with protection from negative consequences*'.[117]

236. Ai Group objects to the proposal. Ai Group responded to it in its March Submission, in so far as it reflects Recommendation 21 of the Work and Care Senate Committee's Final Report,[118] and relies on that earlier submission in response to the ACTU's proposal.

237. *Fifth*, the ACTU proposes *'a positive obligation to provide employees with rosters that accommodate caring responsibilities (Right to Care Roster Clause)'*.[119]

238. Ai Group opposes the proposal for reasons that ought to be self-evident. The proposal would compound the many adverse implications flowing from various existing provisions that curtail employers' discretion to set hours of work in a way that reflects their genuine needs. It would potentially also create unfairness between employees with caring responsibilities and those without. Further, the safety net already contemplates a right to request flexible work arrangements –

[116] See model consultation clause about changes to regular rosters or hours of work in the Discussion paper published by the Commission on 18 December 2023 in relation to the issue of 'job security' (**Job Security Discussion Paper**) at [226].

[117] ACTU Submission at [99] and Recommendation 13.

[118] March Submission at [50].

[119] ACTU Submission at [99] and Recommendation 13.

which may go to matters such as rostering arrangements – on the basis of their responsibilities as a carer.[120]

239. *Sixth*, the ACTU proposes conciliation and arbitration of rostering disputes by the Commission, with the status quo applied until the matter is resolved.

240. In some contexts, employees are already able to bring disputes concerning rostering arrangements to the Commission. Where the parties agree, they can be dealt with by arbitration. Ai Group would however oppose the introduction of provisions that enable rostering disputes more generally to be dealt with by the Commission, including by compulsory arbitration.

241. Further, the resolution of a dispute in some cases can require an extended period of time. Employers should not be precluded from implementing (often critical) changes to rosters in the intervening period. In some cases, the proposal would effectively render a proposed roster change otiose, because it would apply during a limited period of time which will necessarily have passed by the time the dispute is resolved. We note that currently, the dispute resolution process expressly (and, appropriately) requires that employees must not unreasonably fail to comply with a direction about performing work while a dispute is on foot, provided that it is *'safe and appropriate'* for the employee to do so.[121]

242. Recommendation 14 of the ACTU Submission[122] is identical to Recommendation 11 contained in the ACTU Job Security Submission.[123] It contains four proposals to change the model consultation clause about regular rosters and ordinary hours of work. We respond to the proposals as follows, and in a manner consistent with the position outlined previously in our Ai Group Job Security Reply Submission.[124]

[120] See Division 4 of Part 2-2 of the Act and in particular s.65(1A).

[121] See for example clause 30.8(b) of the FF Award.

[122] ACTU Submission at page 41.

[123] ACTU Job Security Submission at pages 6 and 29.

[124] Ai Group Job Security Reply Submission at [176] – [180] and [188] – [189].

243. *First,* the ACTU proposes that the standard term should specify that the employer must provide affected employees with information about '*whether the change is expected to be permanent or temporary, and if the latter – the duration'*.[125]

244. Employers are often not in a position to anticipate the period of time over which proposed changes to rosters or hours of work will apply, including whether they are temporary or permanent. We anticipate that in many cases, it would be impracticable to comply with a requirement to provide this information to employees.[126]

245. *Second*, the ACTU argues that the information to be provided '*should include … the effect of the change on the employees' earnings*'.[127]

246. We would oppose a variation to this effect. It would significantly increase the regulatory burden imposed by the provision on employers. This would be particularly pronounced if the clause required (expressly or, in effect) an employer to calculate the precise impact that the proposed change would have on an employee's earnings.[128]

247. Indeed, in some cases, it may not be feasible to assess, with certainty, the impact that the proposed change would have on an employee's earnings. For example, a new roster may involve some inherent uncertainty as to the employee's precise hours of work, or their hours may fluctuate over time.[129]

248. In other instances, the information provided by an employer about a proposed change may enable an employee to make the requisite assessment themselves (e.g. where an employee will no longer be rostered to perform work on shifts or at other times that attract penalty rates, it may be reasonably clear that the employee will experience a reduction in earnings). Where an employee is unable

[125] ACTU Submission at [102] and Recommendation 14.

[126] See also Ai Group Job Security Reply Submission at [176].

[127] ACTU Submission at [102] and Recommendation 14.

[128] See also Ai Group Job Security Reply Submission at [178].

[129] See also Ai Group Job Security Reply Submission at [179].

to do so, they would be at liberty to ask for this information through the consultation process.[130]

249. *Third,* the ACTU proposes the information provided by an employer about a proposed change should be provided in writing.[131]

250. We would strongly oppose any requirement to provide the requisite information in writing. This issue was specifically considered by the Commission when the model term was developed. It remains the case that such an obligation '*would impose an unwarranted regulatory burden on business*'.[132]

251. This is particularly relevant in the context of this model clause, which requires an employer to consult in every instance that it '*proposes to change the regular roster or ordinary hours of work of an employee*'. In a medium or large enterprise within which it is necessary to alter rosters and hours with some frequency in order to, for example, respond to changing operational demands, a requirement to provide information in writing would be particularly burdensome.[133]

252. *Fourth,* the ACTU argues that any information in writing should be provided in a manner which *'facilitates employee understanding of the proposed changes, having regard to their English language skills'*.

253. This issue was also expressly considered and determined by the Commission when the model term was developed. The Commission declined to introduce any such requirement, having regard to the burden that it would impose on business.[134] The existence of such an obligation in one award (i.e. the *Textile, Clothing, Footwear and Associated Industries Award 2020*)[135] by no means justifies its introduction across the safety net.

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[130] See also Ai Group Job Security Reply Submission at [180].

[131] ACTU Submission at [102] and Recommendation 14.

[132] *Consultation clause in modern awards* [2013] FWCFB 10165 at [83]. See also Ai Group Job Security Reply Submission at [188].

[133] See also Ai Group Job Security Reply Submission at [189].

[134] *Consultation clause in modern awards* [2013] FWCFB 10165 at [83].

[135] ACTU Submission at [101].

AMWU ([14] – [17] and Recommendation 1)

254. The AMWU's Recommendation 1 contains three proposals.

255. The *first* proposal is that '*[e]mployers should be required to give advance notice of at least 4 weeks of rosters and roster changes (except in exceptional circumstances)*',[136] and is consistent with the position put by the ACTU in its Recommendation 13.[137] We oppose this proposal, and in doing so refer to and rely on our response at [230] above.

256. The *second* proposal is that awards be varied to *'expressly prohibit employers from changing rosters without consultation and genuinely considering employee views about the impact of proposed roster changes and to accommodate the needs of the employee*'.[138] We note the similarity in this proposal to the aspect of ACTU Recommendation 13 discussed at [231] above. We oppose this proposal, and in doing so refer to and rely on our response at [232] above.

257. The *third* proposal concerns an employee ''*right to say no' to extra hours with protection from negative consequences'*[139] and reflects an identical proposition put by the ACTU in its Recommendation 13.[140] We oppose this proposal, and in doing so refer to and rely on our response at [236] above.

ASU ([24] – [27])

258. We refer to the ASU Submission at [24] – [27] and note that it does not advance any specific proposals regarding the issues it seeks to there highlight. Accordingly, we provide only the following brief responses.

[136] AMWU Submission, Recommendation 1 on page 6.

[137] ACTU Submission at [99] and Recommendation 13.

[138] AMWU Submission, Recommendation 1 on page 6.

[139] AMWU Submission, Recommendation 1 on page 6.

[140] ACTU Submission at [99] and Recommendation 13.

259. In response to the ASU's assertion that *'[a]ll employees deserve consistent and reliable rosters regardless of their employer'*, [141] we reiterate our earlier comments at [227] above.

260. With regards to the ASU's observations regarding awards that currently either require a minimum period of notice of a shift (and permit shift changes on notice), or do not prescribe a minimum period of notification of a roster;[142] Ai Group refers to and relies on Chapter 12 of our March Submission.[143]

UWU ([27] – [30])

261. We refer to and rely upon [29] – [30] and [33] of our March Submission, in response to the comments at [27] of the UWU Submission concerning the Work and Care Senate Committee's '*roster justice'* recommendation.[144]

262. The UWU Submission at [28] advances four proposals that relate to awards generally, each of which we oppose and respond to below.

263. The *first* proposal is that *'[e]mployers should be required to give advance notice of 28 days of rosters and genuinely consider employee views about the impact of proposed roster changes and to accommodate the needs of the employee'*,[145] in response to which we refer to and rely upon our earlier submissions at [232] – [233] above.

264. The *second* proposal is that *'[r]oster changes should only be able to be made with 14 days' notice and with the agreement of the employee'*.[146]

[141] ASU Submission at [24].

[142] ASU Submission at [25] – [27].

[143] See in particular our March Submission at [179] – [181].

[144] Interim Report of the Work and Care Senate Committee handed down in October 2022 (**Interim Report**), at xii and [6.46] – [6.55]; UWU Submission at [27].

[145] UWU Submission at [28](a).

[146] UWU Submission at [28](b).

265. We oppose any such restriction on roster changes, and generally refer to and rely upon our March Submission at [179] – [188]. We also refer to and rely on our submissions above in response to the ACTU, at [225] – [253].

266. The *third* proposal is that *'[e]mployees must have a 'right to say no' to extra hours or roster changes with protection from negative consequenc*es',[147] in response to which we refer to and rely upon our earlier submissions at [236] above.

267. The *fourth* proposal is that *'[t]he circumstances under which a roster may be changed without notice and without agreement must be strictly limited. Where an award provides that a roster can be changed without notice in an emergency, the term emergency should be defined'*.[148]

268. Ai Group opposes the proposal. It would unreasonably constrain the circumstances in which rosters can be changed. In its March Submission, Ai Group instead proposed that awards that contain pre-existing rostering provisions provide a unilateral right for an employer to vary the roster with a short period of notice in the event of unforeseen circumstances.[149]

269. The UWU also advanced specific proposals to vary two awards.

270. The first would result in clause 13.6(a) of the *Cleaning Services Award 2020* (**Cleaning Award**) being replaced with the following:

> The employer must prepare a roster showing for each employee their name and the times at which they start and finish work 28 days prior to the commencement of the roster (except in exceptional circumstances).

271. The proposed provision would extend the application of the rostering provision in the Cleaning Award to casual employees. It would also impose a requirement to give 28 days' notice of rosters.

[147] UWU Submission at [28](c).

[148] UWU Submission at [28](d).

[149] March Submission at [181](b) and [186] – [188].

272. Ai Group opposes the proposal. We refer to and rely on [180] of our March Submission and our submissions above at [225] – [253] in response to the ACTU Submission.

273. The UWU identifies a concern with the rostering provisions in the SCHCDS Award but does not advance a specific proposal to vary the award.

274. The UWU's submission highlights the challenges facing employers covered by the SCHCDS Award in relation to the scheduling of work. Short notice changes by the employer's clients often require an employer to make changes to its rosters to ensure that its services are able to be provided in accordance with its clients' needs. Clause 25.5(d)(ii)(B) of the SCHCDS Award appropriately permits an employer to make changes to rosters in the circumstances described therein.

275. We also refer to and rely on our March Submission at [181](a) and [186] – [188] in reply.

HSU ([45] – [49])

276. In response to the HSU's endorsement of Recommendation 5 of the Interim Report (at [45] of the HSU Submission), Ai Group refers to and relies upon its March Submission at [29] – [31] and [33] – [36].

277. In response to [46] of the HSU Submission:

    (a) Employers in the aged care and disability services sector commonly need to change rosters, often at short notice, due to the nature of their operations. Their clients exert considerable choice and control over what services they receive, as well as when and where they access them. It is critical that the relevant awards do not encumber an employer's ability to respond to its clients' changing needs, as well as other unexpected operational demands.

    (b) It has become increasingly common for employers to communicate with employees about their rosters via the use of mobile phone applications (or *'apps'*). Ai Group would oppose any proposal to limit the way in which employers may notify employees of their roster via electronic means, such

as through the use of such apps. Indeed, in the MAEU stream, we have proposed that awards should be amended to clarify that such forms of communication are permissible.

278. At [48] of the HSU Submission, the union argues that provisions in the SCHCDS Award, the Aged Care Award and the HPSS Award that permit changes to rosters at any time *'in the event of staff illness or emergency are too broad'*. The union goes on to say that they *'allow the unilateral variation of rosters without any consultation'*.

279. The union's submission is misguided. The model consultation clause concerning changes to regular rosters and ordinary hours of work would, in the prescribed circumstances, require an employer to consult an employee about proposed changes to their roster.

280. Further, the provisions mentioned are by no means *'too broad'*. Indeed, in our submission, they do not go far enough. In this regard we refer to and rely upon our proposal at [181](a) and [186] – [188] of the March Submission.

281. The HSU proposes, at [49] of the HSU Submission, the introduction into awards of '*allowances for roster changes within certain periods of time, and to expressly prohibit employees being rostered outside their agreed availability without consultation'*.[150]

282. Ai Group opposes the introduction of any additional costs being imposed on employers in respect of roster changes made at short notice. Employers should not be penalised for seeking to legitimately respond to their changing needs.

283. In relation to the proposed requirement to consult with employees about roster changes outside agreed availability, Ai Group submits this is not '*necessary*' given the model consultation term concerning changes to rosters and hours of work already deals with the requirement to consult with an employee (other than

[150] HSU Submission at [49].

an employee whose working hours are irregular, sporadic or unpredictable) in relation to any proposal to change their regular or ordinary hours of work.[151]

284. Further, the introduction of any notion of employee *'availability'* is potentially fraught and likely to create a raft of additional complexities; least of all because an employee's availability may change regularly.

CPSU ([58] – [62] and Recommendations)

285. In response to [58] of the CPSU Submission, Ai Group disagrees that clause 25.5 of the SCHCDS Award requires two weeks' notice of any modification to a roster. Rather, clause 25.5(a) requires at least two weeks' *initial* notification of a roster for a particular roster period.[152] Clause 25.5(d) deals with notification of roster *changes* and permits changes with seven days' notice or '*at any time'* in the circumstances prescribed in clause 25.5(d)(ii).[153]

286. The CPSU's reliance on rostering practices in *'other male dominated 24-hour roster occupations'*[154] is misplaced. Plainly, the circumstances of industries in which rosters are provided with six months' notice is vastly different to the sectors covered by the SCHCDS Award. It does not follow that the same degree of stability and predictability of hours can reasonably be expected under the SCHCDS Award.

287. Ai Group opposes the proposal at [61] of the CPSU Submission (and first Recommendation set out under [62]) that the notice period for roster changes pursuant to clause 25.5 of the SCHCDS Award should be increased to a minimum of four weeks' notice.[155] We refer to and rely on our submissions above in response to the UWU Submission and the HSU Submission.

Job Security Discussion Paper at [226] subclause C.1.

[152] Clause 25.5(a) of the SCHCDS Award.

[153] Clause 25.5(d) of the SCHCDS Award.

[154] CPSU Submission at [59].

[155] CPSU Submission at [61].

288. At [62] of the CPSU Submission, and the second Recommendation set out following this paragraph, the CPSU proposes the insertion of a new roster clause in the SCHCDS Award '*as per NSW ADHC Rostering Principles*'.[156]

289. We understand this to be a reference to Schedule 4 – Rostering Principles contained in the *Crown Employees Ageing, Disability and Homecare – NSW Department of Family and Community Services (Community Living Award) 2015*.[157] The NSW ADHC Rostering Principles are extremely prescriptive and run to some three pages.[158]

290. Ai Group objects to any proposed amendment of the SCHCDS Award to incorporate any such rostering restrictions. The inclusion of such '*Rostering Principles*' in the SCHCDS Award would further increase complexity and the regulatory burden for employers with respect to rostering, as well as increase employment costs (for example, by requiring standard shift lengths of 8 or 10 hours and payment at overtime rates where a roster change occurs with less than 24 hours' notice[159]). Such outcomes would be contrary to ss.134(1)(f) and (g) of the Act.

291. Finally, we contest the proposition that rosters are used *'as a mechanism to favour one employee over another'*, as alleged by the CPSU.[160]

ANMF ([55] – [61])

292. We refer to the ANMF's proposal to vary clause 13.2(c) of the Nurses Award to increase the period of advance notification of a roster from seven to 28 days, as set out at [56] – [57] of the ANMF Submission. Ai Group opposes this proposal, for the reasons expressed earlier in this submission.

[156] CPSU Submission at [62] and second Recommendation set out beneath this paragraph.

[157] Serial C8701.

[158] See Schedule 4 of the Community Living Award.

[159] Clause 2(v) and (viii) of Schedule 4 of the Community Living Award.

[160] CPSU Submission at [60].

293. We refer to [58] – [59] of the ANMF Submission and the proposal contained therein, for clause 13.2(e) of the Nurses Award to be varied to increase the minimum notification period for a roster change from seven to 14 days, and include a penalty for changes made with less than 14 days' notice.[161] Ai Group opposes any increase to the period of notice required for a change in roster pursuant to clause 13.2(e), and the insertion of any associated penalty provisions. We refer to our earlier submissions in response to a similar proposal advanced by the HSU.

294. We also oppose the ANMF's proposal for clause 13.2(a) of the Nurses Award to be varied to require a 28-day roster cycle.[162] The proposal would reduce flexibility for employers to select the most appropriate roster cycle for their operations, contrary to s.134(1)(d) of the Act. Moreover, many employers of nurses cannot reliably forecast their rostering needs, four weeks at a time.

295. However, there may be merit in amending clause 13.2(a) to provide that '*Employees will work in accordance with a weekly ~~or~~, fortnightly or 28-day roster fixed by the employer*'. This would provide employers with the option of utilising a 28 day roster period. It is appropriate that the option of which roster cycle is utilised rests with the employer, given this is likely to be heavily influenced by operational considerations.

WFPR ([15] – [18])

296. We refer to the WFPR Submission at [15] – [17], and its proposal at [18](b) that awards be amended to require two weeks' notice of rosters for all full-time and part-time employees, together with '*a minimum notice period of 7 days for changes to rosters, which must be genuinely agreed to by employees, with exceptions only in properly defined emergency situations outside the employer's control*'.[163]

[161] ANMF Submission at [56] – [57].

[162] ANMF Submission at [60] – [61].

[163] WFPR Submission at [18](b).

297. Ai Group opposes these proposals and reiterates its earlier submissions to the effect that:

(a) The vast majority of awards do not presently regulate the provision of rosters or the circumstances in which rosters may be varied, which is appropriate and should remain the case;[164]

(b) Ai Group strongly opposes the introduction of a minimum roster notice period of two weeks, for the reasons articulated at [179] of our March Submission and earlier in this submission; and

(c) Where awards contain pre-existing rostering provisions, they should be varied as proposed at [181] of our March Submission, for the reasons explained at [182] – [188] inclusive of the March Submission.

[164] March Submission at [180].

13. QUESTION 9 – AVAILABILITY & GUARANTEED REGULAR HOURS

298. Question 9 is as follows:

> Are there any specific variations to guaranteed hours or availability of hours provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

ACTU ([103] – [105] and Recommendation 15)

299. The ACTU's Recommendation 15 is that awards should be varied in the following ways:

(a) To require employers to reach agreement with their employees as to *'a guaranteed number of hours each week … and the time the employee is available to work those hours'*.

(b) To restrict an employer's ability from *'requiring employees to work outside of their agreed available hours, except with some form of penalty such as the payment of overtime'*.

(c) Ensure employees have written records of their engagement and agreed hours.[165]

300. It is unclear if the above proposals relate to part-time employees only. We proceed on the basis that they do, given the context in which they have been advanced.[166]

301. It appears that the ACTU is advancing a model of part-time employment that is more flexible than many existing award terms (and relative to what it advances in response to question 1). If that is so, we would be open to discussing this proposal further, for the purposes of endeavouring to ascertain whether some common ground can be reached about potential award variations.

[165] ACTU Submission at pages 42 – 43.

[166] ACTU Submission at [103] – [105].

302. If the ACTU's proposal relates to full-time or casual employees, it is strongly opposed by Ai Group. Moreover, having regard to the nature of full-time and casual employment, it is not clear how the proposed provisions could operate.

SDA ([227] – [232] and Recommendations 22 – 23)

303. The SDA advances two recommendations in response to question 9:

    (a) That awards should be varied to restrict an employer from requiring employees to work outside of agreed available hours (Recommendation 22).

    (b) That awards should be varied to include an allowance for part-time employees who are required *'to give availability for access to additional hours'* (Recommendation 23).

304. In relation to Recommendation 22; we strongly oppose this proposal. The availability of employees is generally not a matter relevant to how and when employers can arrange ordinary hours of work. That is entirely appropriate. Awards set various parameters within which ordinary hours may be arranged and employers are at liberty to exercise their discretion to organise work within those structures.

305. Awards generally do not, and should not, require employers to take account of employees' availability. To do so would significantly increase the challenges already facing employers in respect of scheduling work and rostering employees. It would multiply the regulatory burden facing employers. This is particularly so given an employee's availability may change from time to time or indeed, may change frequently.

306. In respect of casual employees, the proposal is entirely unwarranted, as they are at liberty to refuse an offer of work if they are not available.

307. In support of Recommendation 23, the SDA submits that part-time employees *'keep themselves available during times of stated availability to ensure they can accept a shift that may or may not be offered'*.[167] Employers should not be required to make a payment to employees who choose to make themselves available for additional work. Employers have little if any control over the extent to which employees do so. They are not doing so at the direction of their employer and by extension, an obligation to make a payment should not apply.

UWU ([5] – [14])

308. We have addressed the aforementioned aspect of the UWU's submission at Chapter 5.

ANMF ([62] – [68])

309. The ANMF's submissions concern full-time employees covered by the Nurses Award. In essence, it seeks a complete reform of the basis upon which they are employed, such that the relevant requirements mirror those applying to part-time employees in many awards. That is, the award would require:

    (a) A guarantee of a regular pattern of hours, or reasonably predictable hours;

    (b) Agreement upon engagement as to the days of the week that the employee will work, start and finish times, and the time and duration of meal breaks; and

    (c) Minimum engagement periods.[168]

310. With respect, the ANMF's proposal is outlandish. Coupled with its proposal to vary the part-time employment provisions found in the Nurses Award, employers would lose their discretion to set hours of work as needed and instead, they would be beholden to their employees' wishes and availabilities. That is (or should be) self-evidently unworkable and could have deleterious implications for

[167] SDA Submission at [231].

[168] ANMF Submission at [66].

employers of nurses (as well as those who receive their care). It would inevitably result in greater reliance on casual employment and labour hire arrangements.

311. The ANMF's proposal should not be entertained any further.

CFW ([17] and [36])

312. The CFW contends that *'modern awards should include an express prohibition on employers from rostering employees outside their agreed availability without agreement'*.[169]

313. We oppose this for the reasons set out earlier in response to the SDA.

WFPR ([19])

314. In response to question 9, the WFPR argues that awards should be varied in three ways.

315. *First,* it submits that *'working time regulation provisions in modern awards [should] provide predictability in work schedules for all part-time and full time employees, and facilitate mutually agreed flexibility, with any employee disamenity properly compensated by wage premia or penalty rates'*.[170]

316. The WFPR does not advance any specific proposals that would give effect to its submission above. In the circumstances, we do not propose to respond to it at this stage.

317. *Second,* it submits that the casual loading should be increased. We strongly oppose this submission, for the reasons set out in the Ai Group Job Security Reply Submission.[171]

[169] CFW Submission at [36].

[170] WFPR at [19](a).

[171] Ai Group Job Security Reply Submission at [98] – [105], [109] and [117].

318. *Third,* it contends that the definition of casual employment should be further narrowed. We note that the legislature has recently done so. No further changes should be made in this regard.

14. QUESTION 10 – OVERTIME, TOIL & MAKE-UP TIME

319. Question 10 is as follows:

> Are there any specific variations to overtime, TOIL or make-up time provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

Overtime

320. In response to question 10, e three categories of proposals concerning overtime have been advanced:

(a) Payment for additional hours worked by part-time employees at overtime rates;

(b) Increases to the penalty rate payable for overtime; and

(c) A broader review of working hours and related matters.

321. We discuss and respond to each of the three categories of proposals below.

<u>Payment to Part-Time Employees for Additional Hours at Overtime Rates</u>

322. *First*, the ACTU, AMWU, SDA and ANMF all either propose, or endorse the proposal of, payment for all additional hours worked by part-time employees at overtime rates.

323. We turn first to deal with the ACTU Submission, which notes the interconnectedness of the right under awards to payment for overtime with other provisions dealing with matters such as ordinary and guaranteed hours, the span of hours, days worked and type of employment.[172] The ACTU identifies awards (such as those covering the road transport and manufacturing sectors) that require payment of overtime on additional hours as disincentivising the use of '*low hour'* contracts, and as a corollary, awards such as the Aged Care Award which do not require such payment and which, it argues, facilitates low-hours contracts.[173]

[172] ACTU Submission at [106].

[173] ACTU Submission at [107].

324. The ACTU asserts that awards covering male dominated industries tend to have a narrow span of hours which results in payment of overtime on more hours, than awards covering female dominated industries which more commonly have a larger span of hours.[174]

325. ACTU Recommendation 16 proposes that *'(a)wards should be varied to ensure that overtime is paid on all additional hours worked outside of ordinary hours for casual, part time and full time employees*'.[175]

326. The AMWU endorses the ACTU's recommendation.[176]

327. We refer to and rely on our earlier submissions in response to the fourth element of Recommendation 2 advanced by the ACTU.

328. Further, as noted earlier in our submission at Chapter 11, in the context of similar arguments advanced by the SDA with respect to the span of hours provisions in awards, it is not clear that the differences in the span of hours provisions in the awards considered in the ACTU Submission have any gendered basis. Rather, the difference in the span of hours may be explained by the nature of the operations or services provided in a particular industry.

329. For example, the building and electrical contacting industries, which the ACTU identifies as *'male dominated industries'*,[177] are industries which do not tend to require extended operating times, as compared to the aged care industry, which is identified as being a '*female dominated industry*'.[178] Unsurprisingly, the aged care industry needs to operate for extended hours for various reasons, including client demand and the need to provide essential services to those clients.

330. The SDA Submission reiterates earlier claims made by it for a review of overtime provisions in awards impacting SDA members, which it claims are restricted in their operation by '*the non-existing or expansive nature of span of hours*

[174] ACTU Submission at [106].

[175] ACTU Submission, Recommendation 16 on page 44.

[176] AMWU Submission at [20].

[177] ACTU Submission at [108].

[178] ACTU Submission at [108].

clauses',[179] as well as in relation to payment of overtime to part-time employees for additional hours worked.[180]

331. We oppose the SDA's claims and in doing so, refer to and rely upon our earlier submissions at Chapters 5 and 11, in response to the unions' claims about the span of hours and payment of overtime to part-time employees.

332. The ANMF raises the issue of payment to part-time employees for additional hours worked, specifically in the context of the Nurses Award. It argues that in its current form, clause 19.1 of the Nurses Award provides employers with '*a strong incentive to engage part-timers on low hour contracts and gain a disproportionally high degree of flexibility at no additional cost, save accrual of entitlements'*[181] whilst also creating uncertainty about the number of hours that comprise '*rostered daily full-time hours'* since this can vary between workplaces.[182]

333. The ANMF proposes that clause 19.1 of the Nurses Award be varied so as to require that *'(a)ll time worked by part-time employees in excess of their agreed ordinary hours in accordance with clause 10.2 will be overtime and will be paid as prescribed in accordance with clause 19.1(a)*'[183].

334. Ai Group opposes this claim, which we have responded in Chapter 5 of this submission.

[179] SDA Submission at [233]. See also SDA Submission concerning '*Span of Hours'* at [194] – [226] inclusive and Recommendations 20 and 21 on pages 63 – 64.

[180] SDA Submission at [234]. See also SDA Submission concerning part-time employees at [71] – [83], including Recommendation 2.

[181] ANMF Submission at [71].

[182] ANMF Submission at [72].

[183] ANMF Submission at [73].

Increase to Overtime Penalty Rates

335. *Second*, the AMWU and ANMF both advance claims to increase the rate at which overtime is required to be paid under awards.

336. The AMWU proposes that, '*in recognition that additional hours of work impacts work and care*', the penalty rate applicable to the first three hours of overtime under awards should be increased. The AMWU proposes that, where a more beneficial entitlement does not already exist, employees should be paid:

    (a) 175% of the ordinary hourly rate for the first three hours and 200% thereafter for overtime performed Monday to Friday; and

    (b) 200%, for all weekend overtime.

337. Ai Group strongly opposes the AMWU's proposal. The union argues for a sweeping increase to overtime penalty rates across all awards based on a single, brief paragraph concerning a statistic published by the OECD on the prevalence of overtime worked in Australia.[184] The AMWU Submission does not advance any substantive merit-based arguments in support of its proposal, which would have extremely significant adverse impacts for employers with respect to the consequent increase in employment costs.[185] Ai Group submits the claim ought to be rejected by the Commission on this basis.

338. The ANMF advances a proposal confined to increasing overtime rates payable under the Nurses Award.[186] It claims that currently, overtime rates are not sufficiently distinguished from weekend penalty rates which creates an incentive for employers to treat weekend hours as *'overtime'*, thereby negating the requirement to accrue leave entitlements and pay superannuation in respect of the weekend hours worked.[187]

[184] AMWU Submission at [19].

[185] Section 134(1)(f) of the Act.

[186] ANMF Submission at [75] – [81].

[187] ANMF Submission at [78] – [79].

339. Currently under the Nurses Award, ordinary hours on a Saturday and Sunday are paid at 150% and 200% (respectively) of the minimum hourly rate, whilst weekend overtime is paid at 150% for the first two hours (and 200% thereafter) on a Saturday, and 200% of the minimum hourly rate on Sundays.[188]

340. The ANMF proposes an increase to the overtime rates under the Nurses Award, so that Saturday overtime would be paid at 200% for all overtime hours (an increase of 50% on the first two hours of overtime) and Sunday overtime would be paid at 250% (an increase of 50% on all hours of overtime). It further proposes that the rates for overtime on a public holiday would be subject to review if the proposed changes were made (but does not propose any specific change).[189]

341. The ANMF Submission states that its analysis '*applies equally to clause 19.2 of the Nurses Award'* which deals with overtime rates for casual employees (with the exception of its argument concerning leave accruals).[190] Whilst the ANMF's submission in this respect is unclear, we infer this is an intention by the ANMF to similarly propose an increase in overtime rates payable to casual employees.

342. Ai Group opposes the ANMF's proposal, which is predicated on an assertion that employers are incentivised to use the overtime provisions in the Nurses Award to circumvent liability for leave entitlements and superannuation. The ANMF has not provided any evidentiary basis for this assertion, or established that the overtime provisions in the Nurses Award are currently having this effect.

343. To the contrary, there are many conceivable reasons in the context of nursing why employers may not be able to make rostering decisions in advance regarding the need for employees to work ordinary hours on weekends. These reasons may include, for example, an influx of new patients or changed care requirements for existing patients. Employers should not be penalised in the form of increased overtime rates, when faced with legitimate operational reasons to request or require the performance of weekend overtime by employees.

[188] Clauses 19.1 and 21 of the Nurses Award. See also ANMF Submission at [75] – [77].

[189] ANMF Submission at [80].

[190] ANMF Submission at [81].

Broader Claims Concerning a Review of Working Hours and Related Matters

344. *Third*, in the context of discussion in the Paper concerning reasonable additional hours and a reduced working week[191] and claims variously being pursued by its affiliates,[192] the ACTU proposes *'[t]he 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*'.[193]

345. The ACTU expresses its proposal as being '*consistent with Recommendations 22 and 27 of the Work and Care Final Report*'.[194]

346. The AMWU endorses the ACTU's proposal.[195]

347. Recommendation 22 of the Final Report was as follows:

> The committee recommends the Australian Government write to FWC suggesting a review of the operation of the 38-hour working week set in the National Employment Standards, the extent and consequences of longer hours of work. The review should also consider stronger penalties for long hours and other possible ways to reduce them, including through the work, health and safety system which requires employers to ensure safe working hours as a part of providing a safe workplace.[196]

348. Recommendation 27 of the Final Report was as follows:

> The committee recommends the Australian Government request the FWC undertake a review of standard working hours with a view to reducing the standard working week.[197]

349. Ai Group opposes the ACTU's proposal. The *'standard'* 38-ordinary hour working week is a longstanding and deeply entrenched feature of the safety net. Any amendment to it would require extensive and detailed consideration. Importantly, any reduction to it would likely impact employers profoundly.

[191] ACTU Submission at [111] – [112].

[192] ACTU Submission at [113].

[193] ACTU Submission at [114] and Recommendation 18 on page 45.

[194] ACTU Submission at [114.

[195] AMWU Submission at [20].

[196] Extracted in the Paper at page 16.

[197] Extracted in the Paper at page 17.

350. Further, a downward revision of the standard working week would, in our view, would also necessitate a consideration of whether the significant overtime rates currently payable under awards are warranted. The disutility associated with working overtime is likely less where one has worked fewer ordinary hours.

351. In any event, as stated in our March Submission, Ai Group disagrees that Recommendation 22 of the Final Report is relevant to the Review.[198] Additionally, to the extent the Commission is minded to give any weight to either the Interim Report or Final Report in the Review, we refer to and rely upon our March Submission at [52].

352. The ACTU has not advanced any evidentiary or merit-based foundation for its proposal. It essentially proposes (and the AMWU endorses) a wide-ranging enquiry far beyond the scope of this Review which would be inappropriate in the current context.

353. The WFPR makes two proposals. Ai Group notes that neither concerns matters capable of being dealt with within the scope of the Review and accordingly, opposes both.

354. The WFPR's first proposal is similar to the ACTU proposal in urging that '*the Federal government review and strengthen the NES on maximum weekly hours of work to ensure it operates as an enforceable cap on long hours*'.[199]

355. The NES already operates to provide employees with a right to refuse hours in addition to 38 per week in various circumstances (or the lesser of ordinary hours and an employee's ordinary weekly hours, where the employee is not engaged on a full-time basis).[200] An employee who refuses to work additional hours may be seen as exercising a '*workplace right*'[201] in respect of which the employee is protected from taking adverse action against them, pursuant to the general

[198] March Submission at [51].

[199] WFPR Submission at [21] – [22] and [23](a).

[200] Section 62 of the Act.

[201] As defined in section 341 of the Act.

protections provisions contained in Part 3-1 of the Act.[202] Whether additional hours are reasonable will depend on the circumstances, having regard to the matters that must be taken into consideration pursuant to s.62(3) of the Act. Such an approach is appropriate and should be preferred over any proposed blanket '*enforceable cap'* on hours, devoid of operational or individual employee context.

356. Ai Group also opposes the WFPR's claim regarding the need for there to be any '*review and strengthening'* of the protections regarding maximum working hours in the NES.[203] The proposal is unnecessary,[204] taking into account the existing framework of protections for employees described above together with a '*right to disconnect'*, including the proposed inclusion of terms dealing with this right in awards, having only recently been introduced by the *Fair Work Legislation Amendment (Closing Loopholes No. 2 Act) 2024* (Cth) (**Closing Loopholes No. 2 Act**).[205] The '*right to disconnect'* provisions in the Act are yet to commence,[206] and proceedings concerning the formulation of the model term were recently initiated by the Commission. The '*right to disconnect'* complements existing employee entitlements under the NES for employees to refuse to work reasonable additional hours.[207] In the circumstances, it would be premature to consider the need for any further '*strengthening*' of employee protections concerning working time.

357. The second proposal advanced by the WFPR asks that '*(g)overnments providing funding for the social and community services sector ensure funding levels are sufficient to pay employees for all time worked, so workers are not required to donate additional, unpaid hours'*.[208]

[202] See in particular section 340 of the Act.

[203] Division 3 of Part 2-2 of the Act.

[204] Section 138 of the Act.

[205] Part 8 of Schedule 1 to the Closing Loopholes No.2 Act.

[206] Part 8 of Schedule 1 to the Closing Loopholes No. 2 Act is due to commence on 26 August 2024 (other than for small businesses), and on 26 August 2025 for small business employers. See item 10 of table in section 2 of the Closing Loopholes No. 2 Act.

[207] Section 62 of the Act.

[208] WFPR Submission at [20] and [23](b).

358. Ai Group notes that the WFPR does not provide any evidence in support of its contention that workers in the social and community services sector are not being paid for all hours worked. Nevertheless, in principle Ai Group agrees that it is important for the funding model for the sector to appropriately account for the monetary entitlements of employees under the SCHCDS Award, including any penalty rates that may apply due to employee patterns of work. However, this is a matter outside the scope of the Review.

Time-Off-In-Lieu of Overtime (TOIL)

359. The ACTU, AMWU and HSU all either propose, or endorse the proposal of, TOIL being calculated with reference to the overtime payment that would have been made and not the actual number of hours worked. We briefly outline the submissions of each union, before responding to the proposal.

360. The ACTU argues that differences between awards as to the amount of time taken in lieu of overtime (with some awards prescribing an amount of time equivalent to the overtime payment that would have been made, and others requiring TOIL to be calculated with reference to the actual number of hours worked) gives rise to unfairness as between employees, and may be exploited by employers imposing on employees a policy of taking TOIL instead of making overtime payments[209] (a claim also made in the HSU Submission).[210]

361. The ACTU proposes that awards be varied to consistently require TOIL to be equivalent to the overtime payment that would have been made, rather than the actual time worked.[211]

362. The AMWU endorses the ACTU's proposal.[212]

363. The HSU advances the same proposal in relation to the Aged Care Award, SCHCDS Award and HPSS Award only, on the basis that there '*does not appear to be any justifiable reason'* why the TOIL entitlement should be less than

[209] ACTU Submission at [19].

[210] HSU Submission at [52].

[211] ACTU Submission at [110] and Recommendation 17 on page 44.

[212] AMWU Submission at [20].

compared to other awards.[213] The HSU claims that inequity in TOIL provisions in these three awards is '*particularly concerning when considered in the context of the high level of part-time employment and low wages characteristic of work covered by the Awards'*.[214]

364. Ai Group opposes the proposals. Whilst the HSU asserts there '*does not appear to be'* a justification for the difference, neither the HSU Submission nor the ACTU Submission gives any consideration as to the historical or industry-specific rationale for the existence of the differences.

365. Accrual of TOIL on a '*time for time'* basis (rather than on a '*time for penalty rate'* basis) is consistent with the *Family Leave Test Case Standard*.[215] In its development of the model TOIL clause for awards as part of the 4 yearly review, the Commission saw no reason to depart from the test case standard regarding the calculation of time for the purpose of TOIL.[216] Relevantly, the Full Bench held that s.134(1)(da) of the Act does not mandate the provision of TOIL on the basis of compensatory time.[217] However, the Full Bench determined to make an exception for awards which already provided for TOIL at the overtime penalty rate.[218]

366. Evidently, the awards to which the unions point as providing a '*time for time'* method of TOIL accrual reflect the *Family Leave Test Case Standard*. In order for their proposals to succeed, the ACTU, AMWU and HSU should be required to satisfy the Commission that it is appropriate to depart from that standard.[219] The submissions filed by the unions in support of this proposal fail to do this.

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[213] HSU Submission at [51] – [54] and Proposal 4 on page 12.

[214] HSU Submission at [53].

[215] See discussion of the standard established in *Family Leave Test Case – Stage 1 – November 1994 decision* – (1994) 57 IR 121 and *Personal/Carer's Leave Test Case – Stage 2 – November 1995 decision*– (1995) 62 IR 48 (together, the ***Family Leave Test Case Standard***), in the Commission's consideration of the development of the model TOIL clause in *4 yearly review of modern awards – Common issue – Award flexibility* [2015] FWCFB 4466 (***July 2015 TOIL Decision***) at [181].

[216] *July 2015 TOIL Decision* at [255].

[217] *July 2015 TOIL Decision* at [173].

[218] *July 2015 TOIL Decision* at [268].

[219] *July 2015 TOIL Decision* at [181].

367. Further, the proposals would have the effect of increasing employers' costs in so far as they would result in greater time off being taken by employees and in turn, increase costs associated with replacement employees. Ai Group submits that such a change should not be entertained, particularly given the conclusions of the Full Bench in the July 2015 TOIL Decision set out above.

Make-Up Time

368. The HSU and ANMF have each advanced proposals concerning make-up time provisions in awards.

369. The HSU Submission raises a concern in relation to the operation of clause 25.5(f) of the SCHCDS Award and specifically, the election by employers to provide an employee with make-up time rather than payment for a cancelled weekend or public holiday shift.[220] In this circumstance, the HSU argues, an employee is not entitled to the weekend or public holiday penalty, which '*has obvious implications for the low-paid, highly part-time, feminised workforces covered by the SCHADS Award'*.[221]

370. The HSU expresses a view that consideration should be given to varying the clause so that employees do not lose penalties and allowances that would otherwise have been payable, but for the employer electing to provide make-up time.[222]

371. Ai Group opposes the HSU's view, and in doing so notes that the effect of clause 25.5(f)(vi)(E) of the SCHCDS Award is that an employee who works make-up time arising from a cancelled shift is entitled to '*be paid the amount payable had the employee performed the cancelled service or the amount payable in respect of the work actually performed, whichever is the greater'*. Accordingly, there is no loss of penalties or allowances as contended by the HSU.

[220] HSU Submission at [55].

[221] HSU Submission at [55].

[222] HSU Submission at [56].

372. For completeness, Ai Group further notes that clause 25.5(f) of the SCHCDS Award was only very recently subject to extensive consideration as part of the 4 yearly review of modern awards.[223] The Commission amended clause 25.5(f) having regard to extensive submissions and evidence before it, with one aspect of the variation including the removal of the option of withholding payment from an employee in the event of client cancellation.[224] Ai Group submits that it is not appropriate to reopen consideration of clause 25.5(f) so soon following the Commissions determination in the 4 yearly review absent a compelling basis to do so.

373. Lastly, the ANMF points to an absence of make-up time provisions in the Nurses Award, which creates difficulties for its members when attempting to reconcile their working hours with the ordinary business hours of care and health services.[225] The ANMF proposes the Nurses Award be varied to include make-up time provisions.[226]

374. Ai Group agrees with the ANMF's view that the Nurses Award should be varied to include make-up time provisions. We refer to and rely on [193] – [197] of our March Submission in this regard.

[223] See *4 yearly review of modern awards* - Social, Community, Home Care and Disability Services Industry Award 2010—*Substantive claims* [2021] FWCFB 2383 at [742] – [842]. See also: *4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award* [2021] FWCFB 5244; *4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 5641; and *4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010* [2022] FWC 198.

[224] 4 yearly review of modern awards - Social, Community, Home Care and Disability Services Industry Award 2010—Substantive claims [2021] FWCFB 2383 at [815].

[225] ANMF Submission at [82].

[226] ANMF Submission at [83].

15. QUESTION 11 – ON-CALL AND RECALL TO DUTY

375. Question 11 of the Paper asks:

> Are there any specific variations to on-call or recall to duty provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

Gender Equity Considerations

376. The ACTU, ASU and HSU all point to awards that apply to male-dominated industries as having higher on-call entitlements than awards applying to female-dominated industries. [227]

377. The ACTU proposes these differences be rectified by varying awards to require payment to employees '*across the board'* where they stand by for duty.[228] The ACTU proposes payment at ordinary rates or '*at the very least, allowances should be significantly increased'*.[229]

378. The ASU and HSU call more generally for the on-call, recall and sleepover provisions in certain awards identified as applying to female-dominated industries to be considered by the Commission against the objects in ss.3 and 134(1)(ab) of the Act concerning gender equity*'*.[230]

379. The HSU also specifically calls for the recall provisions in the SCHCDS Award and HPSS Award to be reviewed to provide for recall not requiring a physical return to the workplace (to include, for example, work performed over the phone).

380. Ai Group objects to the proposals. The existing on-call and recall provisions in these awards likely reflect various historical and contextual considerations (including the circumstances in which those provisions were developed and any arbitral consideration given to them). There would need to be a detailed examination of such matters if the existing on-call and recall provisions are to be

[227] ACTU Submission at [116] – [117]; ASU Submission at [32]; HSU Submission at [57].

[228] ACTU Submission at [119] and Recommendation 19 on page 46.

[229] ACTU Submission at [119] and Recommendation 19 on page 46.

[230] ASU Submission at [32]; HSU Submission at [61].

re-assessed, noting that neither the ACTU, ASU nor HSU Submissions provide any such detail as context for the basis of their proposals.

381. Moreover, any assertion that the differences are a product of gender-related considerations would require a proper examination of various complex issues. It is not possible to undertake an examination of that kind in this Review, given the nature of the process.

382. The unions' approach of simply pointing to other awards typically applying in male-dominated industries as evidencing gender inequality in on-call and recall entitlements is a simplistic approach that overlooks the nuanced circumstances in which employees are required to be on call and/or are recalled to work in different industries and sectors. It cannot be assumed that the disutility associated with being on call and/or recalled to work in all sectors is the same. To this end, we note the Commission has previously determined that the MAO might be met through a different combination of terms and conditions in different awards.[231]

383. In the specific context of the HSU's claims concerning the SCHCDS Award, we note that the issue of remote response work and recall to work were given extensive consideration by a Full Bench during the 4 yearly review and which resulted in the insertion of clause 25.10 of the SCHCDS Award.[232]

384. Ai Group submits that it is not appropriate to reopen consideration of clause 25.10 (or the issue of re-call on on-call work performed by employees covered by the SCHCDS Award) so soon following the Commissions determination in the 4 yearly review absent a compelling basis to do so (and which, on the basis of the ACTU, ASU and HSU submissions, there is not).

[231] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [33].

[232] See *4 yearly review of modern awards - Social, Community, Home Care and Disability Services Industry Award 2010—Substantive claims* [2021] FWCFB 2383 at [644] – [738]. See also: *4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 5641 at [78] – [209].

On-Call

385. With respect to aspects of on-call provisions in awards *other* than the rates at which employees are paid, the HSU calls for the SCHCDS Award and HPSS Award to be reviewed to:

    (a) Provide employees with an entitlement to minimum periods free from being on-call;

    (b) Increase the minimum payment for workers required to be on call and when re-called to work overtime; and

    (c) Modernise the telephone allowance to reflect modern communication methods.[233]

386. Ai Group opposes the HSU's proposal. We refer to our earlier submission at [380] above regarding the likely historical and contextual considerations underpinning the existing entitlements in these awards. In so far as the HSU's claim concerns the SCHCDS Award, we refer to and rely upon our submission at [383] – [384] above to the effect that a broad re-opening of its provisions so soon following the Commission's determination in the 4-yearly review absent a compelling basis to do so (and which there is not).

387. The CPSU proposes the removal of clause 25.6 (which deals with broken shifts) from the SCHCDS Award.[234] In the alternative, the CPSU proposes '*an appropriate allowance should be provided to ensure that the worker is not financially disadvantaged for being available*'.[235]

388. Ai Group objects to the CPSU's proposal. The provisions of the SCHCDS Award dealing with broken shifts, as well as the issue of compensation of travel time for employees, was also subject to extensive consideration as part of the 4 yearly

[233] HSU Submission at [61].

[234] CPSU Submission, Recommendation on page 10.

[235] CPSU Submission, Recommendation on page 10.

review of modern awards.[236] The Full Bench determined to vary clause 25.6 of the SCHCDS Award (which deals with broken shifts) and in doing so, observed that broken shift allowances compensate employees for the disutility of working broken shifts.[237]

389. For completeness, it is noted that the ANMF Submission points to a change made to the Nurses Award as part of the 4 yearly award review, to make clear that a period of time designated as '*free from duty'* also excludes being on-call.[238]

390. The ANMF asserts that *'[t]his is an important protection that assists in ensuring employees are able to have proper breaks from work and to engage in family and personal life without disruption*'[239] but does not seek to advance any specific proposal off the back of this submission nor to otherwise clarify to what end this submission is made.

391. Whilst the ANMF Submission is not explicit as to why it raises this point, to the extent it does so with a view to the relevant provisions of the Nurses Award being adopted as a standard to be replicated across awards more generally, we would oppose this. The changes to the Nurses Award were made following detailed consideration of evidence and submissions by the Commission as part of the 4 yearly review. The ANMF has not identified any basis to warrant the extension of those entitlements more broadly.

[236] See *4 yearly review of modern awards - Social, Community, Home Care and Disability Services Industry Award 2010—Substantive claims* [2021] FWCFB 2383 at [742] – [842]. See also: *4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award* [2021] FWCFB 5244; *4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010* [2021] FWCFB 5641; and *4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010* [2022] FWC 198.

[237] *4 yearly review of modern awards - Social, Community, Home Care and Disability Services Industry Award 2010—Substantive claims* [2021] FWCFB 2383 at [535] and [539].

[238] ANMF Submission at [89] – [90].

[239] ANMF Submission at [91].

Recall to Duty

392. The AMWU proposes a '*general recall/called-back entitlement'* similar to that contained in clause 29 of the *Graphic Arts, Printing and Publishing Award 2020* (**Graphic Arts Award**). For reference, clause 29 of the Graphic Arts Award provides as follows:

> **29. Call-back**
>
> 29.1 Call-back applies when an employee is called back to perform work at a time when they would not ordinarily be at work and the employee has not been notified prior to last finishing work that they would be called back.
>
> 29.2 Except as otherwise provided in clauses 29.4 and 29.5 , an employee called back will be paid one hour's ordinary pay for the call back and, in addition, will be paid as provided in clause 29.3 .
>
> 29.3 All time worked on a call-back will be paid for at double ordinary hourly rates of pay with a minimum of 3 hours' work or payment at that rate instead.
>
> 29.4 In the event of an employee receiving a call-back and then, prior to commencing work, being informed by the employer that their services are not required for such call, the employee will, if they have:
>
> (a) left their place of residence, be paid in accordance with clause 29.3 as if they had in fact started work; or
>
> (b) not left their place of residence, be paid one hour's ordinary pay.
>
> 29.5 The provisions of clause 29 will not apply where notification is given after the employee's last occurring working day immediately preceding a weekend or rostered period off greater than 48 hours that they are required to report for overtime work prior to their normal commencing time on the first working day after that weekend or rostered period off and such overtime work:
>
> (a) does not exceed 30 minutes; and
>
> (b) is continuous with the commencement of their ordinary working time.

393. Recommendation 3 of the AMWU Submission calls for:

(a) Call back entitlements to apply '*when an employee is called back to perform work at a time when they would not ordinarily be at work and the employee has not been notified prior to last finishing work that they would be called back*';

(b) Payment for call-back to comprise:

(i) One hour's ordinary pay for the call-back; and

(ii) Payment at double ordinary hourly rates for all time worked on a call-back; and

(c) A minimum of payment for 4 hours' work (or payment instead).[240]

394. The AMWU advances the proposal on the basis it would '*properly compensate for the disruption and unpredictability that call back poses to work and care responsibilities*'.[241]

395. Ai Group opposes the proposal. The AMWU has not advanced any merit or evidence-based submissions in support of its proposal. Rather, it contends for a simplistic, broadbrush approach that would entail replicating a particular standard across all awards devoid of any consideration as to the appropriateness of that standard in the context of particular industries or occupations.

396. Further, the AMWU's proposal would likely increase employment costs for employers and add length and complexity to some awards where there may be no practical utility in the provisions.[242]

397. The ANMF Submission points to changes made during the 4 yearly review to the provisions of the *Nurses Award 2010* in relation to work required when on call and when not on call, and does not seek any changes of these provisions in the context of this Review.[243] The ANMF expresses a view that work done away from the workplace via electronic communication is '*appropriately recognised'* under the Nurses Award (via payment at overtime rates).[244]

[240] AMWU Submission, Recommendation 3 on page 8.

[241] AMWU Submission at [23].

[242] Section 134(1)(f) and (g) of the Act.

[243] ANMF Submission, at [84] – [87].

[244] ANMF Submission at [88].

398. However, the ANMF states that it '*draws attention to the considerations of the Full Bench in [that] matter, particularly as it highlights the disutility of recall to work remotely and the resulting disruption to family and personal life'*.[245]

399. Whilst the ANMF Submission is not explicit as to why it raises this point, to the extent it does so with a view to the relevant provisions of the Nurses Award being adopted as a standard to be replicated across awards more generally, we would oppose this. The changes to the Nurses Award were made following detailed consideration of evidence and submissions by the Commission as part of the 4 yearly review. The ANMF has not identified any basis to warrant the extension of the aspects of the Nurses Award it refers to, or the Commission's commentary regarding them, more broadly.

[245] ANMF Submission at [87].

16. QUESTION 12 – TRAVEL TIME

400. Question 12 is as follows:

> Are there any specific variations to travel time provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

ACTU ([120] – [126] and Recommendation 20)

401. In response to question 12, the ACTU advances the following:

(a) A recommendation that awards be varied to provide appropriate compensation for all hours spent on work related travel, training, administrative responsibilities and handover.

(b) The proposition that where work is conducted across multiple sites, it involves travel and employees using their own car. If working in regional and remote areas, the distances travelled are generally greater and there are increased fuel costs, vehicle wear and tear, and increased work, health and safety (**WHS**) and fatigue management issues.

(c) The proposition that many care workers are not paid for time spent travelling, being on call, completing administrative tasks or undertaking training.

(d) The proposition that there is a clear need to vary awards to ensure they provide for appropriate compensation for all hours worked, an issue which is disproportionately affecting female workers. The ACTU identifies various female dominated industries, including the home care, disability, residential aged care, children services, hospitality and fitness industries and refers to the submissions of its affiliates in this regard.

402. We advance the following submissions in response.

403. *First*, to the extent that the ACTU Submission relates to payment for training, being on call, and completing administrative responsibilities and handovers, it is unclear how this aspect of the proposal relates to the travel provisions in awards (that being, the scope of question 12).

404. *Second*, provided that the training and administrative type work described by the ACTU, is in fact work performed at the direction of the employer and in the course of the employee's duties, we see no reason why such work would not warrant payment. Any failure to pay wages in individual cases for such work does not justify award variations. There are various existing avenues available for addressing any such alleged non-compliance, which may be utilised instead.

405. *Third*, we would oppose any proposed variation requiring payment for *'all hours spent on work related travel'*. It is self-evident that it would result in increased employment costs and would potentially also increase the regulatory burden.

406. *Fourth,* the task of developing a methodology for calculating how much an employee is to be paid for time spent travelling is inherently complex. It would necessitate detailed consideration being given to a raft of issues on an award-by-award basis, including the following:

    (a) Not all travel constitutes work that is undertaken at the direction of the employer or as part of the employee's duties. Travel that does not constitute work should not attract payment.

    (b) There is an inherent difficulty involved in providing for such payment due to the impacts of traffic. An employee may take a certain route because it is shorter, but it takes longer to travel due to traffic (which would be unfair to an employer if payment is calculated by reference to the time taken). Alternatively, an employee may take a route that is faster (because there is limited traffic), but the distance travelled is much longer (which would be unfair to an employer if payment is calculated by distance travelled).

    (c) There is not one accepted or commonly used routing tool. Google Maps, Apple Maps, Waze and Bing Maps are just some of the mapping tools available. Vehicles also have their own individual map routing software, and so do '*Satellite Navigation'* and '*GPS'* devices such as TomTom and Navman. It is foreseeable that, depending on the mapping tool software used, time spent travelling or distance travelled can substantially vary. This

could lead to unnecessary disputation, contrary to the need to maintain a stable and sustainable[246] awards system.

(d) It is unclear how such payments for travel would interact with those that are already provided with a company car, or where the employee does not in fact drive and is instead travelling by other means including public transport and carpooling.

407. A one-size-fits all approach to travel is not appropriate because of the various practical issues (such as those above) which would need to be worked through. It may also be the case that certain awards do not (and should not) provide for payment for travel between sites, because such travel is not commonly undertaken within that particular industry.

408. *Fifth*, as to the proposition that time spent travelling between multiple work sites will result in increased fuel costs, and vehicle wear and tear; we submit that employees can already claim tax deductions for such expenses. Numerous awards also provide for a travel allowance that is provided to an employee for using their own vehicle for work, including 23 out of the 25 awards[247] considered as part of this aspect of the Review.

409. *Sixth*, as to the proposition that time spent travelling to regional or remote areas increases WHS and fatigue management issues, we submit that this does not assist the Commission in determining whether awards should be varied to include payments for travel time. The ACTU has provided no evidence or examples of where travel to regional or remote areas within a particular industry (or indeed across all award-covered industries) has been so frequent or excessive that it has given rise to issues of WHS or fatigue management. It also goes without saying that even if payment is provided for time spent travelling to remote or regional areas, this may not address or prevent these purported issues from occurring.

[246] Section 134(1)(g) of the Act.

[247] The Paper at [208].

410. *Seventh*, as to the proposition that many care workers are not paid for time spent travelling, we again reiterate that not all travel constitutes work. We also suspect that the study that is referred to by the ACTU, which found that around 15% of the total hours worked by community sector workers were unpaid, did not clarify the circumstances in which travel in fact constitutes work. The unreliability of the statistic cited can be observed by the following statement in the study: (emphasis added)

> *Unpaid hours were relatively low among those who agreed there were enough staff to complete the work, but above average among respondents who did not agree there were enough staff to get the work done (Table B. 4). Unpaid work is also associated with participants' perceptions of pay. Those who agreed with the statement "I am paid fairly for the work that I do" performed fewer unpaid hours than others. Correspondingly, those who did not feel they were paid fairly reported higher average unpaid hours (Table B. 5). Not surprisingly, then, working conditions were often cited by participants considering moving into other jobs (see Section 5.4).*[248]

411. It is apparent from the extract above that:

(a) Workers who agreed that there were not enough staff reported higher '*unpaid hours*' than those who agreed that there were enough staff. This observation is important, given that this study was conducted throughout 2021, during the COVID-19 pandemic, where there were significant staffing shortages due to illness and government imposed COVID-19 lockdown measures and restrictions. The perception of understaffing resulting from the COVID-19 pandemic would have skewed the data towards a greater number of perceived unpaid hours.

(b) Workers who *'did not feel they were paid fairly'*, tended to report higher *'unpaid hours'* than those who agreed that they were fairly paid.

412. These observations highlight the unreliability of the statistic referred to by the ACTU in seeking to establish that there is a high incidence of unpaid work in the community services sector.

[248] Cortis, N. and Blaxland, M. (2022) 'Carrying the costs of the crisis: Australia's community sector through the Delta outbreak', Australian Council of Social Service and the Councils of Social Service, <https://www.acoss.org.au/wp-content/uploads/2022/04/ACSS-Full-2021-Report-v6.pdf> (accessed 25 March 2024), page 41.

413. *Eighth*, an employer has no control over where an employee's principal place of residence is located. An employee may live in certain locations which may not necessarily suit their working arrangements (which we acknowledge can be due to a number of personal reasons and circumstances, including because of caring responsibilities), but they inevitably have to travel significantly more than other workers who perform the same job. It would be inherently unfair to require that certain employees are to be paid more than others, simply because they live further away from their workplace. This unfairness is particularly salient when considered from an employer's perspective, given that they have no control over where the employee chooses to live.

414. *Ninth*, as to the proposition that female workers are disproportionately affected by the absence of payment for travel time, the ACTU references the material filed by its affiliates. However, none of the ACTU's affiliates have filed material properly dealing with this purported issue.

SDA ([236] – [238] and Recommendation 24)

415. The SDA seeks to have existing travel allowance provisions extended to include travel time and costs associated with travelling between worksites. It notes that whilst historically there has not been much travel that is undertaken in the industries that the SDA has members in, there has been a purported increase in the '*desire'* for employers to roster employees across multiple sites.

416. *First*, it is unclear whether there has been an actual increase in employers rostering employees across multiple sites, or whether there has just been a purported *'desire'* for employers to do so.

417. *Second*, it is unclear whether the SDA claims that employers roster an employee across multiple sites each day or on different days. If the former is what is meant by the SDA, we question the extent of that practice. If the latter is what is meant by the SDA, we submit that travel from an employee's home, to and from a work site or multiple work sites, does not generally warrant payment for travel. The SDA seems to take a contrary view to this at [238] of its submission.

418. Generally speaking, time spent travelling from home to a worksite and back home, does not constitute work. Relevantly, where such travel is undertaken, employers are not able to and do not seek to instruct the employee as to matters such as the route of travel to be undertaken or even the time of the travel. Further, it is entirely foreseeable that employees, before commencing work and after finishing work at the worksite, may travel to other locations.

419. Commissioner Saunders (as he then was) in *Re Alzheimer's Australia WA Ltd*[249] considered the application of clause 20.7(a) of the SCHCDS Award, which is in substantially the same terms as the travel / vehicle allowance clause found across various other awards, including clause 19.7 of the GRIA and clause 17.8 of the FF Award. In that case, Commissioner Saunders considered an application that had been made for the approval of an enterprise agreement that contained a provision similar to clause 20.7(a) of the SCHCDS Award. Relevantly, Commissioner Saunders stated that: (emphasis added)

> **[8]** Although the SACS Award does not expressly state when an employee commences their duties, <u>if an employee made a claim under the SACS Award for the payment of a travel allowance in respect of their travel from their home to the residence of their first client for the day in circumstances where the employee's usual practice was to travel from their home directly to the residence of a client, I am of the view that such a claim would not succeed. That is because an employee's duties do not commence until they arrive at their workplace.</u> For an employee who is engaged to provide services at the residences of clients, the employee's places of work are the residences of their clients. Accordingly, the SACS Award would, in my view, be given the same interpretation as clauses 18.8 and 18.9 of the Agreement in the circumstances to which I have referred.[250]

420. Consistent with the emphasised parts of the passage above, an employee's duties generally do not commence until they arrive at the worksite. By extension, as a general proposition, work does not commence from when the employee leaves their home to go to work.

421. *Third*, as to the proposal to extend the existing travel allowance clauses found in various modern awards to also provide for travel time and costs when travelling between worksites, we submit that this should not be entertained. We refer to and rely on our submissions above in response to the ACTU. In addition, the

[249] *Re Alzheimer's Australia WA Ltd* [2016] FWCA 4863.

[250] *Re Alzheimer's Australia WA Ltd* [2016] FWCA 4863 at [8].

Commission would also need to consider a raft of practical issues with developing an award term that provides for travel costs. For example, what costs can reasonably and fairly be attributed to the employer, whether the relevant costs have been reasonably incurred and requirements for employees to keep and provide sufficient records and receipts.

UWU ([32], [33](a), [34] – [38])

422. The UWU Submission at paragraphs [32] - [33] largely reflects that of the ACTU and SDA above; in particular, that all travel, training, administrative and handover tasks be paid. We have largely responded to such claims in the preceding sections of our submission.

423. The UWU however also raises issues in respect of disability support and home care workers covered by the SCHCDS Award reporting unpaid travel time in the course of their duties. The UWU refers to the 4 yearly review decision of the Commission in respect of the SCHCDS Award, namely where the Commission stated that further consideration of the various travel time claims would be deferred until the variations in respect of minimum payment and broken shifts had been in operation for 12 months.[251]

424. Whilst more than 12 months have passed since the 4 yearly review decision was issued by the Commission in August 2021, there is simply no evidence before the Commission which would suggest that the existing entitlements under the SCHCDS Award, including minimum payments, broken shift entitlements and travel allowances, are not meeting the MAO. Moreover, if the issue of payment for travel under the SCHCDS Award is to be revisited, this would also warrant (as contemplated by the Commission in its decision during the 4 yearly review), a consideration of whether broken shift entitlements and minimum payments should also be adjusted downwards.[252] The Commission acknowledged that

[251] 4 *yearly review of modern awards — Social, Community, Home Care and Disability Services Industry Award* [2021] FWCFB 5244 at [229] – [230].

[252] *4 yearly review of modern awards — Social, Community, Home Care and Disability Services Industry Award* [2021] FWCFB 5641 at [244].

these various entitlements are inherently interconnected. Thus, any adjustment to one gives rise to the prospect of also reconfiguring the other(s).

425. It should also be noted that the UWU could have intervened in the recent award variation proceedings concerning the same matter with respect to travel under the SCHCDS Award.[253] The Commission in that proceeding has now reserved its decision and it would be entirely inappropriate in those circumstances for the UWU or other union parties to agitate and in effect reopen the same claim as part of this Review. To the extent that the Commission is minded to consider the UWU's claims as part of this Review, we rely the detailed submission we filed in that proceeding, against the applicant's claim.[254]

HSU ([62] – [66])

426. The HSU Submission is largely reflective of the submissions advanced by the UWU in respect of the SCHCDS Award. We refer to our submissions immediately above.

427. In relation to the example provided by the HSU in respect of the individual phlebotomist, we submit that this particular situation of being directed to travel to a much farther location than what had initially been intended by the employer, would unlikely be the common practice of employers within that sector. It is clear that this particular employee had been rostered to attend work at a location 4kms from her home, but due to an unforeseen circumstance was required to travel to another location. The experience of this particular individual on this particular occasion cannot be extrapolated to be the common practice within that sector. The Commission ought not to give any substantive weight to this example.

[253] AM2023/11 Application to vary the SCHCDS Award.

[254] Ai Group submission dated 20 December 2023.

CPSU ([70] – [73])

428. The CPSU Submission largely reflects that of the ACTU's in respect of the purported fatigue effects of travelling to regional and remote areas. We refer to our earlier submissions in response to the ACTU on this point. We further note that instances of potential fatigue arising from an employee travelling long distances after a sleepover shift, is a matter that is more appropriately dealt with at the workplace level. Awards ought not (and cannot effectively) prescribe terms and conditions for every situation or scenario that may arise at a particular workplace. Rather, the function of awards is to provide an appropriate minimum safety net.

429. The CPSU also appears to seek the introduction of broken shift allowances and allowances for working less than four hours across an unidentified number of awards. It also seeks that travel time for work be paid in all circumstances. It is difficult to meaningfully engage with these proposals given the lack of any particulars or attempt to identify which awards it seeks to vary, or to provide reasons for such claims.

ANMF ([92] – [94])

430. The ANMF Submission advances two key propositions:

    (a) Travel time to rural, regional and remote areas should be paid.

    (b) The travel allowance of $0.96 per kilometre in the Nurses Award should be increased.

431. As earlier submitted in response to the ACTU, there are a raft of practical issues associated with providing payment for travel time, including the significant impacts of traffic, particularly over a long distance. It is also difficult to define, for example, what is considered to be rural, regional and remote. Moreover, it is unclear whether an employee who lives in a rural, regional or remote area would also be entitled to travel time.

432. The administration of travel time provisions that apply by reference to certain locations or distances would impose a significant regulatory burden on employers, which also weighs against the ANMF's proposal.[255]

433. We note that the scheduling of work in rural, regional and remote areas is often to facilitate the provision of essential services to those communities, where the supply of such services is considerably more limited than in metropolitan areas. The imposition of additional employment costs[256] on employers who do so may indirectly impact those communities, as employers may find that it is no longer viable to provide services to those locations.

434. The ANMF's proposition that the travel allowance of $0.96 per kilometre in the Nurses Award is no longer adequate is not supported by any evidence.

435. The ANMF points to increases in the cost of petrol, vehicle related emergencies and maintaining a safe vehicle as reasons in support of its proposal. The vehicle allowance is adjusted annually, with reference to an *'adjustment factor'* published by the Australian Bureau of Statistics.[257] Consideration would need to be given to the extent to which this indexation already takes into account the costs identified by the ANMF. We would also observe that employers should not be required to compensate employees for all costs associated with maintaining their vehicles, which in most cases would be utilised primarily for private purposes.

CFW ([22])

436. The CFW Submissions largely mirror the submissions advanced by the various unions, including that all employees should be paid for time spent travelling between work locations. We have dealt with this comprehensively in this section of our submission.

[255] Section 134(1)(f) of the Act.

[256] Section 134(1)(f) of the Act.

[257] Clause C.2.2 of the Nurses Award.

437. The CFW also claims that the absence of travel payments leads to the exploitation of workers, including care and support employees covered by the SCHCDS Award. The CFW cites a study conducted by Fiona Macdonald and others,[258] which was undertaken prior to the Commission's 4 yearly review decision in relation to the SCHCDS Award.[259] As a consequence of that decision, the Commission introduced new broken shift and minimum payment provisions into the award, as a means of addressing the unique nature of work and, amongst other things, the incidence of travel in that industry. As earlier submitted, there is no evidence before the Commission that demonstrates that those provisions in the SCHCDS Award are not meeting the MAO.

WFPR ([24] – [27])

438. The submissions of the WFPR largely reflect those advanced by the CFW above. We refer to our submissions in response to the CFW in this regard.

[258] Macdonald, F., Bentham, E., & Malone, J. (2018). 'Wage theft, underpayment and unpaid work in marketised social care', *The Economic and Labour Relations Review,* 29(1), 80-96.

[259] *4 yearly review of modern awards — Social, Community, Home Care and Disability Services Industry Award* [2021] FWCFB 5641.

17. QUESTION 13 – ANNUAL LEAVE

439. Question 13 is as follows:

> Are there any specific variations to annual leave provisions in modern awards, for example annual leave at half pay, that are necessary to ensure they continue to meet the modern awards objective?

ACTU ([127] – [131] and Recommendation 21)

440. The ACTU Submission and Recommendation 21 contain two propositions relevant to annual leave. One relating to the rate of pay, and the second relating to the quantum of leave. We deal with each below. We also rely on the submissions that follow in response to submissions made by the ACTU's affiliates for the same changes.

The Rate of Pay

441. The ACTU has recommended that awards are varied to ensure that when employees take annual leave, they are paid their *'ordinary hourly rate (including any penalties)'* *plus* a 17.5% annual leave loading. Ai Group opposes this proposal for the reasons set out below. It would constitute a significant change in the way that annual leave loading is currently provided in modern awards and have various adverse impacts on business.

442. *First,* it is not clear whether the *'ordinary hourly rate'* is intended to include above-award amounts. We would oppose any such proposal. The Commission has generally erred on the side of declining to regulate the payment of such amounts through the safety net. It should not depart from that approach.

443. *Second,* having regard to the purpose underpinning the entitlement to an annual leave loading, the proposal would clearly result in double-dipping.

444. Annual leave loading clauses in modern awards typically require an employer to calculate the applicable weekend and / or shift penalties that would have been payable to an employee during a period of annual leave, had they instead worked during that period. The employee is then paid the higher of that amount, or the

annual leave loading (generally 17.5% of the minimum rate) for the ordinary hours during a period of leave.

445. Requiring both annual leave loading and any penalty rates to be paid during annual leave is inconsistent with the purpose for which annual leave loading was inserted into modern awards. The Conciliation and Arbitration Commission described this purpose as follows (emphasis added): '*[annual leave loading] was introduced into awards to compensate employees for the loss of penalty rates and allowances they would or could have earned during working weeks, to cushion them against the additional expenses involved in taking a holiday while on leave.*'[260]

446. Clearly, it was not intended that an employee would receive the annual leave loading *and* penalties, allowances etc that the employee would have earned had they worked. Rather, the annual leave loading compensates employees for the lost opportunity to earn such amounts.

447. *Third,* the ACTU's proposal would impose an unacceptable regulatory burden on employers.

448. It can be difficult, if not impossible, for employers to calculate the relevant penalties that would have applied to an employee's hours during a period of annual leave. There are a number of reasons for this, including that employees may work variable hours or have their ordinary hours averaged over a number of weeks, making it difficult to determine with any specificity the pattern of hours they would have worked during a period of leave. In the context of the MAEU stream of the Review, we have proposed that awards be varied to provide that where it is not practicable to calculate the relevant penalty rates, that the annual leave loading be payable instead.[261]

449. The ACTU's proposal would perpetuate the aforementioned problem.

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[260] *Australian Insurance Employees Union v Abbot Associates & Ors; The Australian Insurance Employees Union v American Re-Insurance Company Pty Ltd & Ors* [1977] CthArbRp 3653, 199 CAR 237 at 238.

[261] Ai Group Submission dated 22 December 2023 at [107] – [109].

450. *Fourth,* typically, amounts payable in addition to the base rate of pay compensate employees for a particular disability or disutility. In general terms, such amounts should not be payable where an employee is not working and therefore, not experiencing the relevant disutilities or disabilities.

451. *Fifth,* it is axiomatic that the proposal, if adopted, would increase employment costs. Indeed, the impact could be significant in some contexts.

452. *Sixth,* we do not accept the proposition that existing award terms are *'disincentivising'* employees from taking annual leave, as alleged by the ACTU.[262]

The Quantum of Leave

453. The ACTU has also recommended that the Commission consider the quantum of annual leave. In particular, it has recommended the Commission consider increasing the period of leave to five weeks (with six weeks for shift workers) as well as providing for flexibility as to how annual leave is taken.[263]

454. To the extent that the ACTU's submission seeks to increase the quantum of annual leave in awards, we oppose it. The current standard of four weeks of annual leave reflects a long-established minimum entitlement, as provided by the NES.[264] Notably, Parliament has not sought to alter this, despite recently implementing extensive amendments to the Act in other respects. Increasing the entitlement by 25% would constitute a significant cost increase for employers.

455. As to its second proposition, the ACTU has not advanced any specific proposals. We would not necessarily oppose the introduction of '*flexibility*' as to how annual leave is taken, subject to the matter in which that flexibility would operate. To that

[262] ACTU Submission at [128].

[263] ACTU Submission at [129] – [131] and Recommendation 21 on page 49.

[264] Section 87(1) of the Act.

end, we have proposed that awards should be varied to permit the taking of up to twice as much annual leave at a proportionately reduced rate of pay.[265]

AMWU ([25] – [29] and Recommendation 4)

Casual Employees

456. We strongly oppose the AMWU's submission that annual leave entitlements should be extended to casual employees who have worked at least three months.[266] This would amount to a profound change to the existing framework. It would obviously impose a significant additional cost impost on employers.

457. The AMWU's position disregards the compensation casual employees receive through the casual loading for, amongst other things, an absence of an entitlement to annual leave. In the circumstances, an entitlement to annual leave would result in casual employees double-dipping.

458. Further, considering a leave entitlement in the context of casual employment is somewhat of a misnomer. The very nature of casual employment may result in varying hours each day and week, given that there is '*no firm advance commitment to continuing and indefinite work according to an agreed pattern of work*'.[267] In these circumstances, it is not clear how an employee could be said to be taking *'leave'* from work or, in a practical sense, how an employer could calculate the basis on which a casual employee's leave would accrue or be deducted because it is not possible to determine with any certainty when a casual employee will or would have worked. Requiring employers to do so would also constitute an impermissible regulatory burden.

[265] ACTU Submission at [131] and Recommendation 21 at page 49; Ai Group Submission dated 12 March 2024 at [210] – [219].

[266] AMWU Submission at [26] and Recommendation 4 at page 10.

[267] Section 15A(1)(a) of the Act.

The Quantum of Leave

459. As to the AMWU's submission that the quantum of annual leave should be extended to five weeks for all employees, we oppose this for the reasons set out above at [453] – [454].[268] The member survey referenced by the AMWU is of little value.[269] It is hardly surprising that employees have expressed support for increased leave entitlements. No doubt the result would be the same for any cohort of employees surveyed.

SDA ([239] – [250] and Recommendations 25 – 26)

460. For the reasons set out above at [441] – [452], Ai Group strongly opposes the SDA's submission that employees be paid their ordinary hourly rate (including any penalties) plus 17.5% annual leave loading during periods of annual leave.[270]

461. We also oppose the SDA's submission that the quantum of annual leave should be extended to five weeks (and six weeks for shift workers) for the reasons set out above.[271]

UWU ([47])

462. At Appendix A of the UWU Submission it has proposed a variation to clause 21.3(a) of the Cleaning Award, to ensure payment of the part-time allowance during periods of annual leave required under clause 21.3(a)(iii) is not restricted to part-time employees working shift work (Monday to Friday) or rostered ordinary hours on a Saturday or Sunday.[272] The part-time allowance is 15% of the minimum hourly rate for each ordinary hour worked.[273]

[268] AMWU Submission at [27] – [29] and Recommendation 4 at page 10.

[269] AMWU Submission at [28].

[270] SDA Submission at [241] – [242] and Recommendation 25 at page 43.

[271] SDA Submission [245] – [250] and Recommendation 26 at page 43.

[272] UWU Submission at page 14.

[273] Clause 10.2 of the Cleaning Award.

463. We oppose this change. It would significantly change the existing entitlement. It would impose material additional costs and increase the regulatory burden on employers.

464. As to the UWU's submission that the part-time loading is not payable when employees take personal / carer's leave such that they '*lose out financially'* when they take this leave; this does not fall within the scope of question 13 which relates to annual leave.[274] In any event, we oppose the submission. Any proposal to vary the payment made to employees for personal / carer's leave would need to be the subject of detailed consideration which is not possible in the context of this Review.

HSU ([67] – [73] and Proposal 5)

465. To the extent that the HSU submits that the HPSS Award be varied to provide for an additional week of annual leave, we rely on and repeat our submissions set out at [453] – [454] above.[275]

466. We also oppose the HSU's submission that the definition of *'shift worker'* for the purposes of annual leave in the SCHCDS Award and the HPSS Award, be expanded in the manner proposed.

467. The proposed variations are substantial in nature and would in variably increase employment costs (including for not-for-profit employers who rely on Government funding under the SCHCDS Award).

468. Moreover, the HSU's reliance on the need to compensate employees for *'the disruption to personal and family life which is occasioned by working unsociable and un-family friendly hours'*[276] is misplaced. Employees who perform work on Saturdays and at night are entitled to be paid additional amounts to compensate them for the disutility associated with working at arguably unsocial times. The

[274] UWU submission at [47].

[275] HSU Submission at [67] and Proposal 5 at page 15.

[276] HSU Submission at [72].

HSU does not contend that the relevant penalties or overtime rates do not adequately do so.

469. Lastly, we would observe that the HPSS Award defines a shift worker as one who is *'regularly rostered to work Sundays and public holidays'*.[277] This definition appears in a large number of awards and has a long history. Any departure from it would necessarily need to be carefully, in the context of that history.

CPSU ([74] – [77] and Recommendations)

470. To the extent that the CPSU's submission seeks an increase in the quantum of annual leave in the SCHCDS Award for shift workers and for employees who work in remote areas, we oppose the submission for the reasons set out above at [453] – [454].[278] The CPSU has not established that it is necessary to make such a significant change.

471. We also oppose the proposed clause at Annexure B of the CPSU Submission being inserted into the SCHCDS Award.[279] It is not clear how the provision would operate. In particular, the reference to recreation leave is confusing.

472. In addition, it is not clear how the provision would in fact support employees with caring responsibilities. Subclauses (c) and (d) simply relate to *when* the annual leave loading is payable.

ANMF ([95] – [105])

Definition of *'Shift worker'*

473. The ANMF proposes that the definition of '*shift worker'* for the purposes of accessing an additional week's annual leave be extended to all shift workers, as defined by the Nurses Award to be consistent with the definition in clause 4 would constitute a significant change. We oppose this claim. Currently, only shift workers who are '*regularly rostered over 7 days of the week'* and who regularly

[277] Clause 27.2(b) of the HPSS Award.

[278] CPSU Submission at [75] and Recommendation at page 11.

[279] CPSU Submission at [76] and Annexure B at page 17.

work on weekends are entitled to the additional week of leave.[280] Noting that the Nurses Award already provides for an additional week of annual leave for all employees, this would bring the shift worker entitlement to six weeks in total.

474. Extending the scope of the clause to include *any* employee who is regularly rostered outside the span of hours of a day worker (consistent with the definition in clause 4) would be a significant change to the existing entitlement and have an obvious adverse impact on employers. We rely on and repeat our submissions above regarding the HSU Submission at [466] – [469].

Annual Leave at Half Pay

475. We note the ANMF's submission seeking the Nurses Award be varied to provide for annual leave at half pay is broadly consistent with our own submission.[281] We continue to press for any entitlement to take annual leave in this manner to instead provide for '*up to*' twice as much annual leave at a proportionately reduced rate of pay.[282] We otherwise rely on our March Submission in this regard.[283]

CFW ([24] – [25])

476. The CFW makes a wide-ranging submission that all modern awards be varied to provide for employees to take annual leave at half-pay and provide for employees' rights to annualised purchased leave schemes.

477. There is potential merit in developing award clauses that facilitate the implementation of purchased leave arrangements. Of course, the use of any such arrangements should in all instances be subject to genuine agreement of both employer and employee. The clauses should not be framed as granting a '*right'* to such arrangements.

[280] Clause 22.2 of the Nurses Award.

[281] ANMF Submission at [103] – [105]; March Submission at [210] – [219].

[282] March Submission at [218].

[283] March Submission at [211] – [219].

478. To the extent that the CFW's submission overlaps with our own regarding annual leave at a proportionately reduced rate of pay, we do not oppose it.

ACCI ([182] – [187]) and ABI ([89] – [93])

479. The ACCI Submission and ABI Submission responding to question 13 are largely identical and, as such, we propose to address them together.

480. It is uncontroversial that an award can include a term permitting more annual leave to be taken at a proportionately reduced rate of pay.[284] Indeed, Note 1 below s.55(4) of the Act expressly contemplates a term which provides for employees taking twice as much annual leave at half the rate of pay expressed in s.90 of the Act in this regard.

481. To the extent that ACCI and ABI submit that any provision for taking additional annual leave at proportionately reduced rate of pay should be conditional on agreement, we support this.[285]

[284] Section 55(4) of the Act.

[285] ABI Submission at [89]; ACCI Submission at [183].

18. QUESTION 14 – PERSONAL / CARER'S LEAVE

482. Question 14 is as follows:

> Are there any specific variations to personal/carer's leave provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

483. Broadly categorised, the various proposals that have been filed in relation to the personal/carer's leave provisions in awards seek:

(a) An increase to the rate at which personal/carer's leave is paid, by supplementing the existing NES requirement to pay for leave at an employee's '*base rate of pay'* with an obligation to instead pay for leave at the employee's '*full rate of pay'*;[286]

(b) An expansion of the persons in respect of whom an employee may access their paid and unpaid carer's leave entitlements;[287]

(c) An expansion in relation to the circumstances or types of events for which personal/carer's leave may be taken;[288]

(d) An increase to the amount of paid personal/carer's leave employees are entitled to;[289]

(e) The separation of personal and carer's leave entitlements;[290]

(f) A relaxation of the evidence requirements for taking personal/carer's leave;[291]

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[286] ACTU Submission at [137] and [140]; AMWU Submission at [30]; SDA Submission at [254] – [260].

[287] ACTU Submission at [133] – [136] and [140]; AMWU Submission at [30]; CFW Submission at [36]; SDA Submission at [264] – [275] and Recommendation 29 on page 74.

[288] ACTU Submission at [133] and [140]; AMWU Submission at [30].

[289] ACTU Submission at [133]; AMWU Submission at [30] – [34] and Recommendation 5; UWU Submission at [43] – [44] and [48]; ANMF Submission at [106] – [110]; CFW Submission at [36]; WFPR Submission at [29]-[30] and [33]](a).

[290] ACTU Submission at [133]; AMWU Submission at [30]; CFW Submission at [36]; WFPR Submission at [29] and [33](a).

[291] ACTU Submission at [140] and Recommendation 22; AMWU Submission at [30]; SDA Submission at [261] – [263] and Recommendation 28 on page 47.

(g) An additional, two-day non-cumulative leave entitlement for preventative health care;[292]

(h) Paid personal/carer's leave for casual employees;[293]

(i) The introduction of paid palliative care leave;[294]

(j) An extension to the duration of unpaid carer's leave;[295]

(k) An investigation into the portability of paid personal (sick) and carer's leave, for all social and community services workers;[296] and

(l) The creation of a paid leave system that reflects the diversity of care needs for contract and gig workers, as well as employees (including casual employees).[297]

484. We respond to some aspects of the proposal outlined at [483(b) in Chapter 19, in so far as it intersects with proposals variously advanced concerning the definition of '*immediate family member'*. Further, we address the proposal outlined at [483(e) in Chapter 21.

485. We respond to the remaining proposals in the submissions that follow.

Rate of Payment for Paid Personal/Carer's Leave

486. Section 99 of the Act specifies the rate at which personal/carer's leave is required to be paid, as follows: (our emphasis)

> If, in accordance with this Subdivision, an employee takes a period of paid personal/carer's leave, the employer must pay the employee at the employee's base rate of pay for the employee's ordinary hours of work in the period.[298]

[292] ANMF Proposal at [110].

[293] CFW Submission at [26] – [27] and [36]; WFPR Submission at [30] and [33](b); SDA Submission at [292] and Recommendation 32 on page 56.

[294] WFPR Submission at [33](b).

[295] WFPR Submission at [33](b)(ii).

[296] WFPR Submission at [33](d).

[297] WFPR Submission at [33](b).

[298] Section 99 of the Act.

487. Section 16 of the Act defines an employee's '*base rate of pay'* (other than for piece workers) as '*the rate of pay payable to the employee for his or her ordinary hours of work*', and expressly excludes the inclusion of incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates, or any other separately identifiable amounts.[299]

488. As the Paper notes, awards do not generally deal with any substantive personal/carer's leave entitlements. A confined number of awards are identified in the Paper that set out the unpaid NES entitlement applying to casual employees.[300]

489. The ACTU, AMWU and SDA all either advance, or endorse the advancement of, a proposal that awards should be used as a mechanism to supplement the NES by requiring payment of personal/carer's leave at an employee's full rate of pay instead of the base rate of pay. [301]

490. Section 18 of the Act generally defines the '*full rate of pay'* for employees (other than pieceworkers) as *inclusive* of incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates, or any other separately identifiable amounts.[302]

491. Ai Group strongly opposes these proposals, which would substantially increase both employment costs and the compliance burden for employers. As we outlined in our March Submission, any attempt to address as part of this Review matters which concern definitions in the Act that underpin minimum entitlements is prone to cause difficulty and confusion in the application of those entitlements.[303] An employer may be required to maintain separate systems for calculating personal/carer's leave payments for award-covered employees (based on the '*full rate of pay'*) whilst needing to separately configure its systems

[299] Section 16(1) of the Act.

[300] The Paper at [238].

[301] ACTU Submission at [140] and Recommendation 22 on page 51; AMWU Submission at [30]; SDA Submission at [254] – [260] and Recommendation 27 on page 47.

[302] Section 18(1) of the Act.

[303] March Submission at [39].

those for non-award covered employees entitled to payment for the leave at their '*base rate of pay'*.

492. The introduction of a two-tier entitlement to payment for personal/carer's leave would lead to outcomes that are not consistent with the MAO; in so far as it would lead to increased complexity in the administration of minimum entitlements for employers whose workforce comprises a mixture of award-covered and award-free employees, and increase the regulatory burden on employers. In addition to increases in direct costs associated with rate of payment for the entitlement, employers would likely also face indirect costs associated with adaptation of payroll and other business systems and procedures to accommodate the change.[304]

493. There are also various practical difficulties that can arise when attempting to ascertain an employee's full rate of pay for a period during which they would otherwise have been absent. This is because the *pattern* of hours that they would have worked (and therefore, the penalty rates, allowances etc that would have been payable) may not be discernible. These are outlined above in response to similar submissions advanced by unions in response to question 14, concerning annual leave, at [447] – [449].

494. The ACTU argues in support of its proposal, that payment for personal/carer's leave at base rates can be a disincentive to employees taking leave (insofar as it may result in the employee being paid less than what they would earn had they been at work), as well as *'devaluing'* time taken away from work to attend to caring responsibilities.[305]

495. The contrary argument may also be made, insofar as the absence of any monetary difference between the amount an employee receives for attending or not attending work may operate to incentivise absences or, disincentivise employees on leave from returning to work. To be clear, we make no argument against the appropriateness of employees being absent from work for one of the

[304] Sections 134(1)(f) and (g) of the Act.

[305] ACTU Submission at [137].

legitimate circumstances in respect of which the entitlement is available to be taken, and acknowledge that many workers do use these entitlements properly.

496. The concept of a *'sickie'* is, however, well-known in the Australian workplace vernacular. The reality is that while many workers do the right thing, some do not. In these instances, employers are left to grapple with disruption to business operations and loss of productivity as a consequence of workers who view their entitlement to leave as an unqualified right to 10 additional days' absence from work per year, irrespective of whether they are actually unwell or unfit to attend work, not to mention the various monetary costs associated with the absence.

497. The SDA argues that payment at the base rate of pay '*financially punishes'* employee carers,[306] and is particularly impactful for employee carers who live in low-income households who may rely significantly on penalty rates.[307] The SDA submits that its proposal is consistent with the objectives contained in s.134(1)(a) and s.134(1)(da) of the Act, and also notes the policy rationale for paid family and domestic violence leave being paid at an employee's '*full rate of pay'*.[308]

498. For the reasons already articulated above, we disagree that the balance of considerations under either the objectives of the Act nor the MAO favour the adoption of this proposal. It is also relevant to consider the financial impost of paid personal/carer's leave on employers. Unlike annual leave, for which employers generally have a period of advance notice to plan for the absence, including to adapt its rostering requirements in the most efficient way possible, personal/carer's leave is typically required at short notice (indeed, potentially after the time the employee was due to start work for the day or shift).[309] An employer is more likely to face the prospect of having to pay an employee at overtime rates, or engage a casual employee (entitled to casual loading) or a labour hire employee (often at a commercial premium) to cover the absence – in addition to the amount required to be paid to the absent employee.

[306] SDA Submission at [256].

[307] SDA Submission at [254] – [255].

[308] SDA Submission at [259].

[309] Section 107(2)(a) of the Act.

Persons in Respect of whom an Employee may Access their Paid and Unpaid Carer's Leave Entitlements

499. We outline and respond to the submissions concerning the persons for whom employees should be permitted to take carer's leave at Chapter 19 of this submission.

Circumstances in Which Personal/Carer's Leave may be Taken

500. Section 97 of the Act details the circumstances or types of events in respect of which an employee may take paid personal/carer's leave.[310] In broad terms, there are two types of occasions in which this entitlement may arise.

501. The *first* type of occasion is where the employee is themselves '*not fit for work because of a personal illness, or personal injury, affecting the employee*'.[311] Commonly, when personal/carer's leave is taken in these circumstances it is referred to as '*sick*' leave.

502. The *second* type of occasion is for the purpose of the employee providing '*care or support to a member of the employee's immediate family, or a member of the employee's household*'.[312] The need for care or support must arise out of either *'a personal illness, or personal injury, affecting the member'*[313] or *'an unexpected emergency affecting the member'*.[314] Commonly, when personal/carer's leave is taken in these circumstances it is referred to as *'carer's*' leave.

503. In Ai Group's submission, the Act as currently formulated strikes an appropriate balance between the competing needs of employers and employee carers.

[310] Section 97 of the Act.

[311] Section 97(a) of the Act.

[312] Section 97(b) of the Act.

[313] Section 97(b)(i) of the Act.

[314] Section 97(b)(ii) of the Act.

504. The ACTU, however, argues that constraining the entitlement to situations where there is *'an illness, injury or unexpected emergency'* results in a narrow scope which in turn, represents a limitation on the entitlement.[315] It proposes that paid personal/carer's leave should be permitted to be used for '*other caring activities such as organising formal care arrangements, attending medical and other appointments, and palliative care'*.[316]

505. The AMWU endorses the ACTU's proposal.[317]

506. Ai Group strongly opposes the ACTU's proposal. As it stands, most employees do not use their full paid personal/carer's leave entitlement each year. It can reasonably be expected that any expansion in relation to the circumstances in which personal/carer's leave is permitted to be taken will increase the rate at which employees utilise this leave. In turn, this will have the effect of increasing both direct costs (in the form of paid leave and the cost of replacement labour) and indirect costs (in the form of additional management and administration time, and loss of productivity) for employers.[318]

507. The ANMF makes a more general submission that personal/carer's leave should be broadened beyond '*episodic illness, injury or emergency*' including to allow employees '*to attend to preventative health, such as vaccinations, tests and check-ups*', attend to the preventative health of the people they care for and attend to administrative arrangements related to being a caregiver.[319]

508. We would object to any expansion of the paid personal/carer's leave entitlement for this purpose. Unlike when having to contend with an injury or illness (which are usually unexpected), preventative health appointments are often of a nature that can be booked in advance and to accommodate an employee's work schedule and as such, are most appropriately attended to outside of work hours.

[315] ACTU Submission at [133].

[316] ACTU Submission at [140] and Recommendation 22 on page 51.

[317] AMWU Submission at [30].

[318] Section 134(1)(f) of the Act.

[319] ANMF Submission at [111].

509. When an appointment unavoidably falls within an employee's usual working time, in practice it is common for employers to deal with this flexibly such as by allowing the employee to make up time spent at an appointment at another time. To this end, in our March Submission we proposed an expansion of make-up time provisions in awards to ensure this mechanism is more broadly available to employees and employers to accommodate the need for discrete absences,[320] which might include preventative health appointments. We submit this is a preferable approach to dealing with flexibility needed for matters such as preventative health entitlements, over an expansion of the paid personal/carer's leave entitlement. Employees can also seek to access other forms of leave, such as annual leave.

Increase to the Amount of Personal/Carer's Leave

510. The ACTU, AMWU, UWU, CPSU, ANMF, CFW and WFPR all advance and/or support proposals for increases to the quantum of personal/carer's leave to which employees are entitled.[321]

511. Three *specific* proposals have been put forward regarding the form of the increase.

512. *First*, the AMWU contends that the existing entitlement to *'10 days'* personal/carer's leave should be equivalent to ten ordinary time shifts, regardless of the length of those shifts. The AMWU's proposal seeks to, in effect, overrule the decision of the High Court of Australia in *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29 (***Mondelez Decision***), concerning what amounts to a *'notional day'* for the purpose of the paid personal/carer's leave entitlement.[322]

[320] March Submission at [193] – [197].

[321] ACTU Submission at [140] and Recommendation 22 on page 51; AMWU Submission at [31] – [34] and Recommendation 5; UWU Submission at [43] and [48]; CPSU Submission at page 11; ANMF Submission at [106] – [110]; CFW Submission at [36]; WFPR Submission at [29] and [33](a).

[322] AMWU Submission at [31] – [34] and Recommendation 5.

513. The AMWU contends that the effect of the *Mondelez Decision* is that shift workers may exhaust their paid personal/carer's leave entitlement before taking 10 separate calendar days of leave, with adverse consequences for shift workers with care responsibilities.[323] The AMWU further argues that 12-hour shift workers should be paid for their '*normal hours of work'* on a sick day, in recognition of long and unsociable hours detracting from their work and care responsibilities.[324]

514. The effect of the *Mondelez Decision* was to preserve the widespread industry practice in place prior to an earlier decision of the Federal Court of Australia, whereby personal/carer's leave accruals are calculated in hours on the basis of an employee's ordinary working hours. Contrary to the AMWU's assertions regarding unfairness to 12-hour shift workers, the *Mondelez Decision* had the effect of restoring equity amongst full-time and part-time employees with respect to their leave entitlements, regardless of the length of their ordinary shifts. Kiefel CJ, Nettle and Gordon JJ described the construction of the relevant provisions of the Act adopted by the Federal Court (being the construction proposed by the AMWU) in the following manner:

> That construction is rejected. It would give rise to absurd results and inequitable outcomes, and would be contrary to the legislative purposes of fairness and flexibility in the Fair Work Act, the extrinsic materials and the legislative history.[325]

515. It follows that Ai Group is strongly opposed to the AMWU's proposal. It is neither desirable nor appropriate for the outcome of the *Mondelez Decision* to be disturbed, particularly in the context of this Review. Personal/carer's leave is an entitlement that applies to national system employees generally and should not be fundamentally modified in respect of only award-covered national system employees. We also question the extent to which this can be achieved through awards, in light of s.55(1) of the Act.

516. The distillation of leave entitlements into days and hours within a payroll system can be a complex and nuanced exercise, and if the AMWU's proposal was given effect, would result in employers needing to develop and maintain different leave

[323] AMWU Submission at [33] – [34].

[324] AMWU Submission at [34].

[325] *Mondelez Decision* at [3].

configurations for award and non-award covered employees in respect of the same NES entitlement. This would lead to increased complexity and regulatory burden for employers, as well as costs associated with required payroll system modifications.[326]

517. *Second,* the ACTU argues that the current entitlement provides '*insufficient time for leave*'[327] and proposes an increase by 10 days to the amount of '*dedicated carer's leave*' to which an employee is entitled.[328] The AMWU endorses the ACTU's proposal.[329] The ANMF similarly advances a proposal that the paid personal/carer's leave entitlement be increased to 20 days per year, but only within the Nurses Award, on the basis that the current entitlement is exhausted too quickly, particularly for employees who are care-givers and also need to look after their own health and wellbeing.[330]

518. The proposals to increase the number of days of paid leave would have obvious adverse impacts on business, including various additional costs. Further, they must be viewed in the context of the various other proposals – such as expanded reasons for which the leave can be taken, and relaxed evidence requirements – being sought. Viewed in totality, they are likely to represent an enormous and unsustainable cost burden on employers.[331] Ai Group strongly opposes the proposals.

519. *Third,* the ACTU also proposes an '*additional entitlement to unlimited unpaid personal and carer's leave'* for employees who have exhausted their paid personal/carer's leave entitlement and explored all other forms of flexible workplace arrangements.[332] The AMWU endorses the ACTU's proposal.[333] Ai

[326] Sections 134(1)(f) and (g) of the Act.

[327] ACTU Submission at [133].

[328] ACTU Submission at [140] and Recommendation 22 on page 52.

[329] AMWU Submission at [30].

[330] ANMF Submission at [106] – [110].

[331] Sections 134(1)(f) and (g) of the Act.

[332] ACTU Submission Recommendation 22 on page 52.

[333] AMWU Submission at [30].

Group strongly opposes this proposal, which we address more fulsomely in Chapter 20 of this submission.

520. The UWU advances a more general argument in support of increasing the amount of leave entitlements, and in particular paid personal/carer's leave, to which an employee is entitled. The UWU does not propose any specific amount by which it contends the leave entitlement should be increased.[334] It identifies specific difficulties that may arise for employees who have caring responsibilities or need to attend funerals for relatives overseas,[335] as well as employees in the aged care and ECEC sectors who may be regularly exposed to viral and other illnesses in their workplaces.[336]

521. In response, we note firstly that attendance at funerals is currently (and most appropriately) dealt with in the context of compassionate leave, not paid personal/carer's leave. Secondly, in our submission, the adequacy of infection control measures within particular industries is a matter more appropriately dealt with within the purview of WHS and not through the conferral of additional leave entitlements on employees.

522. The CPSU similarly advances a more general proposal, arguing that personal/carer's leave entitlements are inadequate when shift workers need access to services that other (non-shift worker) members of the community can access during a standard *'9 to 5'* workday.[337] However in our submission, the opposite may also be said to be true – shift workers may be more likely to have time off during week days to be able to attend medical or health practices that are only open within the standard span of business hours.

[334] UWU Submission at [43] and [48].

[335] UWU Submission at [44].

[336] UWU Submission at [48].

[337] CPSU Submission at page 11.

523. In relation to the SCHCDS Award (only), the CPSU proposes a separation of personal and carer's leave entitlements with a commensurate increase in paid days.[338] We refer to and rely upon our earlier comments at [519] above.

524. We address the CFW Submission and WFPR Submission at [596] and [601] below, respectively.

Separate Personal Leave and Carer's Leave Entitlements

525. We outline and respond to the submissions addressing the separation of personal (sick) and carer's leave entitlements at Chapter 21 of this submission.

Relaxation of the Evidence Requirements

526. Section 107(3) of the Act states that an employee who has given his or her employer notice of the taking of paid personal/carer's leave or unpaid carer's leave *'must, if required by the employer, give the employer evidence that would satisfy a reasonable person'* that the leave is taken for a reason permitted by s.97 or s.103(1) of the Act, respectively.

527. The ACTU, AMWU, SDA and ANMF all either propose, or endorse a proposal, for workers to have the ability to use *'enduring forms of evidence'* where an ongoing illness, injury or caring responsibilities require ad hoc absences over a period of time rather than being required to produce evidence on each occasion an employee requests personal/carer's leave.[339]

528. At the outset, we note that s.107(3) does not have the effect of *requiring* an employee to produce evidence on each occasion the leave is requested. Rather, the Act *permits* an employer to require an employee to provide evidence on each occasion. In practice, in some circumstances, employers do not insist on evidence and/or they reduce the standard of evidence required, where leave is taken in the context of an enduring illness or injury, or longer-term caring responsibility. However, employers should have the ability to require evidence

[338] CPSU Submission at page 11.

[339] ACTU Submission at [140] and Recommendation 22 on page 52; AMWU Submission at [30]; SDA Submission at [261] – [263] and Recommendation 28 on page 47; ANMF Submission at [113] – [115].

whensoever they wish. It is appropriate that this matter be able to be dealt with at a workplace level and in the context of the particular circumstances.

529. The ACTU argues that the requirement for a worker to produce evidence on each occasion is '*onerous'* as well as '*costly, time consuming, and can be significant disincentive to workers taking the leave they need'* – particularly where an illness, injury or caring responsibilities may be ongoing over a long period of time.[340]

530. The SDA argues that the current evidence requirement is '*prescriptive*' and operates as '*a burden on those who provide regular care, particularly to someone with a known, ongoing condition'* [341] and a *'barrier'* to utilisation of the entitlements.[342]

531. For leave that relates to a personal illness or injury of an employee, the fact the condition has persisted for a period of time does not of itself undermine the legitimacy of an employer requiring evidence for different occasions of absence during that period.

532. Further, an employer may well have a legitimate need to understand on each occasion how a recurrent illness or injury impacts an employee's current or ongoing work capacity, having regard to the type of work the employee may be scheduled to perform, medication they may be required to take and any limitations that may prevent the employee from safely discharging their usual duties. In addition, for leave that relates to a person the employee cares for, evidence that supports the absence may assist an employer to better understand the care demands on the employee carer and thereby be better placed to identify the potential accommodations the employee may require to support them.

[340] ACTU Submission at [138].

[341] SDA Submission at [261].

[342] SDA Submission at [262].

533. The ANMF Submission points to examples of enterprise agreements which permit *'employees providing or receiving care for a chronic condition or illness to provide evidence from an approved practitioner that is valid for a period of 12 months'*.[343]

534. Separately to the above, the ANMF also notes examples of enterprise agreements in which employees are exempt from providing evidence for an absence less than three consecutive days or for a single day's absence for three occasions in any one year of service, as a way in which the number of times an employee must provide documentary evidence could be reduced.[344]

535. These examples are consistent with our earlier submission at [528] above, that such matters are most appropriately dealt with at a workplace level. Whilst the arrangements identified by the ANMF may be suitable for the workplaces in question, in the context of the award safety net, the relevant standard must be suitable and adaptable for a broad range of workplaces.

Additional Leave Entitlement for Preventative Care

536. The ANMF proposes '*an additional two-days non-cumulative leave for preventative health care, such as vaccinations, breast screens and pap-smears*'.[345] It does not otherwise advance any explanation or detailed rationale for its proposal.

537. We oppose the proposal and refer to and rely upon our earlier submission at [508] above.

Providing Casual Employees with Paid Personal/Carer's Leave

538. The CFW submits that the exclusion of casual employees from access to paid annual and personal/carer's leave is '*highly problematic'* for worker-carers themselves, as well as for ensuring the safety of vulnerable people requiring

[343] ANMF Submission at [114].

[344] ANMF Submission at [114].

[345] ANMF Submission at [110].

care.[346] The CFW proposes paid personal/carer's leave should be provided to casual employees '*to meet the modern awards objective'*.[347]

539. The SDA argues that the casual loading is insufficient to support casual worker carers and proposes casual employees receive paid carer's leave at the rate of pay they would have received had they worked (i.e. the '*full rate of pay'*) without reduction in the casual loading.[348]

540. Ai Group strongly objects to the proposal. We outlined the basis of our objection at length during the earlier Job Security stream of the Review, in Chapter 10 of the Ai Group Job Security Submission. We adopt that submission here, in response to the CFW and SDA proposals outlined above.

Paid Palliative Care Leave

541. The WFPR Submission proposes amendments to the NES to achieve *'a paid leave system that adequately reflects the diversity of care needs for all workers across the life cycle'* and which includes, amongst other things, paid palliative care leave for all workers but does not otherwise explain the rationale for its proposal.[349]

542. The WFPR's proposal is made absent any merit argument in support and as such, we submit should not be given any weight.

543. Carers NSW proposes a government-funded medium-term carer's leave entitlement that may be used for (amongst other things) providing care through a period of palliative care,[350] which we address in more detail at [585] below.

[346] CFW Submission at [27].

[347] CFW Submission at [26] and [36].

[348] SDA Submission at [292] – [297] and Recommendation 32 on page 56.

[349] WFPR Submission at [33](b)(i).

[350] Carers NSW Submission at page 20.

Extending the Duration of Unpaid Carer's Leave

544. The WFPR Submission simply states that the duration of unpaid carer's leave under the NES should be extended, without any specific elaboration on its proposal.[351]

545. We oppose this proposal and respond further on the matter of unpaid carer's leave in Chapter 20 of this submission.

Portable Paid Personal and Carer's leave for all Social and Community Services Workers

546. The WFPR Submission states that social and community services workers who are often employed under the SCHCDS Award, change employers often and in doing so, lose their accrued entitlements.[352] The WFPR points to portable long service leave schemes operating for the sector in various jurisdictions, and proposes that an extension of portability to all forms of paid leave, including sick leave, should be urgently considered.[353]

547. The Review is not an appropriate forum for consideration of any portable sick leave scheme. It would require very careful analysis with respect to the potential costs and benefits, and, if it were to be implemented would need to be enabled via legislation. Further, the WFPR has not advanced any detailed or compelling factual basis for the proposal and as such, Ai Group submits it should be neither adopted nor endorsed within the Review.

Paid Leave System for Contract and Gig Workers

548. The WFPR Submission proposes the NES should be amended to '*create a paid leave system that adequately reflects the diversity of care needs for all workers across the life cycle, including casual, contract and gig workers'*. The WFPR proposes the components of the leave system would include various paid leave

[351] WFPR Submission at [33](b)(ii).

[352] WFPR Submission at [32].

[353] WFPR Submission at [32] and [33](d).

entitlements (including a proposed new paid palliative care leave entitlement, referred to above) and extended unpaid carer's leave.[354]

549. Awards apply only to employees – not independent contractors or *'gig'* workers. It follows that the proposal advanced by the WFPR is outside the scope of the Review and accordingly, should not be given any consideration.

[354] WFPR Submission at [33](b).

19. QUESTION 15 – DEFINITION OF IMMEDIATE FAMILY

550. Question 15 is as follows:

> Noting the Work and Care Final Report Recommendation 17, that the definition of immediate family should be expanded, are there any specific variations in modern awards that are necessary to ensure they continue to meet the modern awards objective?

551. As a starting point, it is relevant to note that s.97(b) of the Act entitles an employee to take carer's leave where required: (emphasis added)

> (b) to 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 of:
>
> (i) a personal illness, or personal injury, affecting the member; or
>
> (ii) an unexpected emergency affecting the member

552. *'Immediate family'* of a person is defined in s.12 of the Act as:

> (a) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the person; or
>
> (b) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the person.

553. A *'de facto partner'* of a person means:

> (a) another person who, although not legally married to the first person, lives with the first person in a relationship as a couple on a genuine domestic basis (whether the first person and the other person are of the same sex or different sexes); or
>
> (b) a former de facto partner (within the meaning of paragraph (a)) of the first person.[355]

554. Section 17 of the Act deals with the meaning of *'child of a person'*, in the following terms:

> (1) A child of a person includes:
>
> (a) someone who is a child of the person within the meaning of the Family Law Act 1975; and
>
> (b) an adopted child or step-child of the person.

[355] Section 12 of the Act.

It does not matter whether the child is an adult.

(2) If, under this section, one person is a child of another person, other family relationships are also to be determined on the basis that the child is a child of that other person.

Note: For example, for the purpose of leave entitlements in relation to immediate family under Division 7 of Part 2-2 (which deals with personal/carer's leave, compassionate leave and paid family and domestic violence leave):

(a) the other person is the parent of the child, and so is a member of the child's immediate family; and

(b) the child, and any other children, of the other person are siblings, and so are members of each other's immediate family.

555. Notwithstanding the expansive familial arrangements captured by the above definitions, the ACTU contends that the definition of *'carer'*, and the limited applicability of carer's leave to '*immediate family'* and '*household members'*, result in the entitlement having a narrow scope[356] that has not '*kept up'* with the changing nature of families and different kinds of family groups. The ACTU claims that this has the result of excluding of many workers with caring responsibilities from accessing the entitlement.[357]

556. The ACTU proposes that paid carer's leave should be available to employees who care, or expect to care, for:

(a) A dependent or any other person significant to the employee to whom the employee provides regular care (in line with Recommendation 17 of the Final Report);[358]

(b) Foster parents, in respect of foster children in their care;[359] and

(c) Persons with whom they have a kinship relationship.[360]

[356] ACTU Submission at [133].

[357] ACTU Submission at [134].

[358] ACTU Submission at [140] and Recommendation 22 on page 51.

[359] ACTU Submission at [140] and Recommendation 22 on page 51.

[360] ACTU Submission at [140] and Recommendation 22 on page 51.

557. Relevantly, Recommendation 17 of the Final Report proposed that the following should be included in the definition of '*immediate family'* in the *Act* (in addition to those already included):

(a) Any person who is a member of an employee's household, and has been for a continuous period of over 18 months;

(b) Any of the employee's children (including adopted, step and ex-nuptial children);

(c) Any of the employee's siblings (including a sibling of their spouse or de factor partner); and

(d) Any other person significant to the employee to whom the employee provides regular care.[361]

558. The AMWU expressly endorses the ACTU's proposal.[362] The ANMF and Carers Tasmania also specifically support the adoption of the Work and Care Senate Committee's Recommendation 17,[363] although Carers Tasmania would see the definition of *'immediate family'* expanded further again to recognise kinship roles and examples of *'other persons'* that may be of significance to an employee.[364]

559. The CFW Submission advances a proposal expressed as being '*in line'* with Recommendation 17 of the Final Report, for all modern awards to contain '*a provision for access to carer's leave for any employee providing care for any person significant to the employee to whom the employee provides regular care*'.[365]

560. The SDA Submission contends that the current linkage of carer's leave entitlements to immediate family and household members *'leaves a gap'* for employees who provide care more broadly within their community, such as to

[361] Final Report, at [8.107]. See also ACTU Submission at [135] – [136].

[362] AMWU Submission at [30].

[363] ANMF Submission at [116] – [117]; Carer's Tasmania Submission at pages 8 – 9.

[364] Carer's Tasmania Submission at pages 8 – 9.

[365] CFW Submission at [28] – [30].

family, friends and neighbours.[366] The SDA proposes that employees be able to access carer's leave to care for '*a person significant to the employee who relies on them for care*'[367] and clarifies that this may include '*anyone the worker provides care to, regardless of whether they form part of the persons household or immediate family*'[368] and endorses the adoption of the Work and Care Senate Committee's proposal regarding for whom an employee should be able to take carer's leave.[369]

561. Both the SDA and ANMF submit there is a need for access to carer's leave entitlements to be more inclusive, taking into account different and broader family structures for Aboriginal and Torres Strait Islander peoples, employees from CALD backgrounds with extended family structures, and the manner in which the LGBTIQ+ community may conceptualise family.[370]

562. The ANMF Submission is of a more general nature, to the effect that '*a broader definition of personal/carer's leave would align with a variation to the definition of immediate family and encompass changing social norms that impact to whom and how care is provided, what care means, and what health and wellbeing mean'*.[371]

563. Similarly, the UWU Submission states simply that the '*concept of care should not be limited to immediate family or close relations'* and speaks to the potential need to provide care for the community in the face of severe weather events.[372]

564. Ai Group opposes the expansion of the definition of '*immediate family'* or other means of expanding the cohort of persons in respect of whom carer's leave may be taken. We advance two key contentions in response to the aforementioned submissions.

[366] SDA Submission at [264].

[367] SDA Submission, Recommendation 29 at page 74.

[368] SDA Submission at [265].

[369] SDA Submission at [275] and ANMF Submission at [116] – [117].

[370] SDA Submission at [271] – [274].

[371] ANMF Submission at [112].

[372] UWU Submission at [45].

565. *First*, it is evident from the definitions set out at [552] – [554] above concerning *'immediate family',* and the existing application of the entitlement to '*household members',* that a number of the categories of potential recipients of care referred to in various proposals that have been advanced are already accommodated. For example, with respect to the LGBTIQ+ community, immediate family members include same-sex spouses and de facto partners.[373] With respect to foster children in the care of foster parents, they would generally be a member of the employee's household and accordingly, a person in respect of whom the person may take carer's leave.

566. *Second*, the definition of *'immediate family'* is found in the Act and any proposal to change that definition is a matter for the legislature. Indeed, Recommendation 17 in the Final Report recommended changes to the *Act*.[374]

567. We would oppose the implementation of any of these recommendations, through modern awards or legislation. They would likely impose additional employment costs, reduce flexibility, compound pre-existing complexities and / or increase the regulatory burden. More particularly, the implementation of these recommendations through the Review would give rise to the following specific concerns.

568. Any attempt to address as part of this Review matters which concern definitions in the Act that underpin minimum entitlements is prone to cause difficulty and confusion in the application of those entitlements. For example, should some (or all) modern awards contain an altered definition of '*immediate family'* for the purpose of carer's leave, an employer who employs both award-covered and award-free employees would be required to administer the NES against two separate definitions. Recommendation 17 in the Final Report is predicated on a view of the Work and Care Senate Committee that '*broader, <u>nationally consistent</u> definitions for leave entitlements would be of great benefit…*' (emphasis added).

[373] Section 12 of the Act. See also [553] above.

[374] Final Report at page xvii.

Evidently, national consistency is not attainable by addressing the issue through this Review.

569. The implementation of the aforementioned recommendations via this Review would lead to outcomes that are not consistent with the MAO; in so far as it would lead to increased complexity in the administration of minimum entitlements for award-covered employees and increase the regulatory burden on employers. In addition to increases in costs associated with the expansion of the relevant entitlements (including as a result of increased staff absences), employers would likely also face indirect costs associated with adaptation of payroll and other business systems and procedures to accommodate the change.[375]

[375] Sections 134(1)(f) and (g) of the Act.

20. QUESTION 16 – UNPAID CARER'S LEAVE

570. Question 16 is as follows:

> Having regard to the Productivity Commission's suggestion for more flexible working arrangements as an alternative to extended unpaid carer's leave, are there any specific variations in the modern awards that are necessary to ensure they continue to meet the modern awards objective?

571. Ai Group agrees with the conclusion of the Productivity Commission as described in the Paper:

> [243] Recently, the Productivity Commission considered whether an entitlement to extended unpaid carer's leave should be available to employees. The Productivity Commission found that while adding an entitlement for 1 – 12 months extended unpaid carer's leave may help support carers, the amendment was not appropriate, due to:
>
> - The impact on household income and the episodic nature of some caring roles would render the entitlement unsuitable or inaccessible for many carers.
> - The entitlement would not improve equity across caring situations.
> - It was likely not the lowest cost way for employers to accommodate working carers.
>
> [244] The Productivity Commission Carer Leave Report suggested that flexible working arrangements, agreed between working carers and their employers, can be a better alternative to extended unpaid leave.[376]

572. As noted in our March Submission, employees with caring responsibilities can generally already make a request for flexible work arrangements pursuant to s.65 of the Act. Further, awards provide various mechanisms to facilitate flexible work arrangements, including through IFAs, TOIL, make up time, etc.

573. The CFW Submission aligns with the Productivity Commission's suggestion and endorses '*increased access to flexible work arrangements through modern award provisions that enable workers to continue to earn income and maintain connection to the workplace*'[377] but does not advance any specific proposals in this regard.

[376] The Paper at [243] – [244].

[377] CFW Submission at [31].

574. Ai Group has advanced numerous proposals within the confines of the Review as to how awards could be made more flexible and thereby, better support employee carers in relation to their caring responsibilities. These include, for example:

(a) Reforming the manner in which part-time employees may be engaged and the terms and conditions that apply to them under awards, so as to provide greater flexibility with respect to the fixation of ordinary hours, greater scope to vary their hours of work and the option to agree to work additional hours at ordinary rates;[378]

(b) Enabling IFAs to be entered into by an employer and a prospective employee, prior to the commencement of their employment;[379]

(c) Facilitative provisions that permit the span of hours to be expanded, on both ends by agreement between an employer and an employee;[380]

(d) Varying awards to facilitate arrangements that involve working from home;[381]

(e) Varying provisions concerning minimum engagement and payment periods, so as to permit them to be reduced by agreement between an employer and an employee, and allowing the minimum engagement requirement to be satisfied by either providing a minimum period of work or by providing a minimum payment of the equivalent amount;[382]

(f) Varying awards to including an ability to perform ordinary hours throughout weekends;[383]

[378] March Submission at [88] – [89].
[379] March Submission at [95] – [107].
[380] March Submission at [108] – [129.
[381] March Submission at [130] – [156].
[382] March Submission at [160 – [171].
[383] March Submission at [172] – [177].

(g) Varying awards that contain pre-existing roster provisions, to permit an employer and employee to vary the roster at any time and provide a unilateral right for an employer to vary the roster with a short period of notice in the event of unforeseen circumstances;[384]

(h) Varying awards to include a provision allowing for make-up time (where they do not already do so), allowing standing agreements to be reached regarding TOIL, and to permit an employer and an employee to extend the period over which TOIL must be taken, by agreement;[385] and

(i) Varying modern awards to permit an employer and employee to agree to the employee taking up to twice as much annual leave at a proportionately reduced rate of pay.[386]

575. It is our submission that proposals designed to genuinely increase flexibility are of greater merit than those advanced by the unions, as described below.

576. The ACTU states that it concurs with the conclusion of the Productivity Commission to a degree[387] and submits that the primary objective should be financial support to carers whilst working, either in the form of paid work that supports them to care or paid time off to care.[388] Notwithstanding this, the ACTU proposes - essentially as an option of last resort[389] - that '*awards should be varied to provide an additional entitlement to unlimited personal and carer's leave where paid personal and carer's leave has been exhausted, all other forms of flexible workplace arrangements (including working from home) have been explored and exhausted, and the employee elects to take unpaid leave'*[390] (emphasis added).

[384] March Submission at [181] – [188].
[385] March Submission at [191] – [201].
[386] March Submission at [210] – [219].
[387] ACTU Submission at [141] - [142].
[388] ACTU Submission at [142].
[389] ACTU Submission at [144].
[390] ACTU Submission at [145] and Recommendation 23 on page 53.

577. The ACTU's proposal for a right to *'unlimited'* unpaid carer's leave is, frankly, preposterous. The effect of the ACTU's proposal would be to confer on employees an award-derived entitlement to unlimited carer's leave. At a practical level, an employee could be absent from their workplace for months, years or even decades and their employer would face a raft significant practical and operational consequences (including costs) flowing from that extended absence. Further, an employer would be prevented under Part 3-1 of the Act from terminating the employee *'because of'* the exercise of that right, notwithstanding the consequences of their extended absence. This is plainly unfair and unworkable.

578. Further, carers who may be unable to attend work for an extended period of time already have protections under the various State, Territory and Commonwealth discrimination laws, as well as the right under the Act to request flexible work arrangements.[391] The ACTU's proposal would only further contribute to the already overregulated and complex web of discrimination and equal opportunity legislation in Australia.

579. The SDA Submission canvases international approaches to extended unpaid carer's leave,[392] before proposing awards be varied to '*include a right to unpaid leave for workers who need extended leave to care for an older person or someone with a disability or temporary or terminal illness, in Awards, with a right to return to work at the end of the unpaid period*'.[393] Noting the potentially negative and disproportionate impact of its proposal on women,[394] the SDA proposes the unpaid leave entitlement should be '*available after genuine consultation regarding options for continued work have been exhausted and the employee elects unpaid leave*'.[395] In addition to a requirement for consultation,

[391] Division 4 of Part 2-2 of the Act.

[392] SDA Submission at [277].

[393] SDA Submission at [276] and Recommendation 30 on pages 75 – 76.

[394] SDA Submission at [278].

[395] SDA Submission at [279] and Recommendation 30 on pages 75 – 76.

the SDA proposes the unpaid leave also be linked to '*a positive obligation in relation to accommodating the continuation of work while caring'*.[396]

580. Our comments at [578] above apply equally in relation to the SDA's proposal. Further, and in relation to the portion of the SDA's proposal concerning '*genuine consultation regarding options for continued work*' and a '*positive obligation in relation to accommodating the continuation of work while caring'*, we note the recent strengthening of the framework in the NES for flexible work requests in employees' favour, including the obligation on employers not to refuse a request without first discussing it with the employee and genuinely trying to reach agreement[397] and the ability for the Commission to arbitrate a dispute about a refused request for flexible work arrangements.[398]

581. Carers NSW proposes a stepped model for short, medium and long-term carer's leave entitlements, each '*with different features and eligibility thresholds designed to accommodate the diversity of caring roles and experiences',* and which should be able to be used flexibly.[399] We address each of these proposed components in the paragraphs that follow.

582. *'Short-term carer leave'* would be based on an expanded version of existing unpaid and paid NES carer's leave entitlements, broadened to include casual employees, be separated from sick leave entitlements, use a broader definition of 'carer' (in line with the *Carer Recognition Act 2010* (Cth)) and have potentially streamlined or minimised evidence requirements.[400]

583. Ai Group strongly opposes the expansion of paid personal/carer's leave entitlements to casual employees. Ai Group previously outlined in detail its position in relation to this matter, it the Ai Group Job Security Submission.[401] We

[396] SDA Submission at [279].

[397] Section 65A(3) of the Act.

[398] Section 65C of the Act.

[399] Carers NSW Submission at page 20.

[400] Carers NSW Submission at page 20.

[401] Ai Group Job Security Submission at [138] – [164].

rely on that submission in response to the Carers NSW short-term carer leave proposal set out above.

584. With respect to the balance of the proposal, we rely on Chapter 19 of this submission in relation to any expansion of the persons in respect of whom personal/carer's leave may be taken, Chapter 21 in relation to any proposed separation of personal and carer's leave entitlements, and [526] – [535] in relation to any proposed relaxation of evidence requirements for carer's leave.

585. *'Medium-term carer leave'* would involve '*government-funded leave booked in advance*' similar to the existing 18-week paid parental leave scheme, and be directed at activities such as transition into aged care, providing support post-hospital discharge, implementing care or treatment plans for new diagnoses and intensive periods of end-of-life care.[402]

586. *'Longer-term carer leave'* would involve absences of up to two years, and be implemented in a similar way to NES parental leave entitlements. In conjunction, Carers NSW proposes the employee be financially supported during the leave, whether through access medium-term carer leave entitlements, receipt of ongoing income or a temporary Centrelink payment.[403]

587. Both the medium-term and longer-term carer leave proposals advanced by Carer's NSW are largely matters for the legislature. Ai Group opposes the proposals, given the significant adverse impact they would have on employers.

[402] Carers NSW Submission at page 20.

[403] Carers NSW Submission at pages 20 – 21.

21. QUESTION 17 – PERSONAL / CARER'S LEAVE

588. Question 17 is as follows:

> Noting Senate Committee Recommendation 18, to consider separating personal/carer's leave entitlement, are there any specific variations in modern awards that are necessary to ensure they continue to meet the modern awards objective?

589. Recommendation 18 of the Final Report of the Work and Care Senate Committee is as follows:

> The committee recommends the Australian Government consider the adequacy of existing leave arrangements and investigate potential improvements in leave arrangements in the *Fair Work Act 2009*, including separate carer's leave and annual leave.[404]

590. Two categories of proposals have been advanced by parties in response to question 17. Both categories of proposals entail an increase to an employee's paid leave entitlement by 10 days.

591. The *first* type of proposal, as advanced by the ACTU and SDA (and discussed in more detail below) proposes a new award-derived entitlement to 10 days' carer's leave in addition to the existing hybrid personal/carer's leave entitlement in the NES.

592. The ACTU argues that *'workers lose access to leave entitlements when taking personal leave to care for others, which may prevent carers being able to access sufficient leave to provide care and look after their own health and wellbeing (due to personal/carer's leave being a single entitlement of 10 days)'*.[405] The ACTU proposes that the entitlements should be separated, but not without an increase to the quantum. Specifically, it is proposed that awards be varied to provide for an additional amount of 10 days' paid carer's leave that can only be taken for caring purposes, whilst still retaining the ability to access the combined personal/carer's leave entitlement if required once that entitlement is exhausted.[406]

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[404] Final Report at [8.111].

[405] ACTU Submission at [133] and [146].

[406] ACTU Submission at [148] and Recommendation 24 on page 54.

593. The SDA submits that current standards of leave are not sufficient to support worker carers,[407] and similarly proposes awards be varied to include a discrete entitlement for 10 days' carer's leave in addition to employees retaining the existing hybrid personal/carer's leave entitlement.[408] The SDA points to ss.3 and 134(1)(a) and (da) of the Act in support of its proposal.

594. Ai Group strongly opposes the insertion of an additional entitlement to 10 days' paid carer's leave in awards. We refer to and rely on our earlier submissions at [510] – [524], in response to the ACTU and SDA proposals set out above.

595. The *second* type of proposal advanced, entails separate personal (sick) and carer's leave entitlements.

596. Relevantly, the CFW Submission proposes '*all modern awards should contain provisions for separate entitlements of 10 days' paid personal leave and 10 days' paid carer's leave'* but does not elaborate on the justification for its proposal.[409]

597. It is unclear how this would interact with the existing NES entitlement to personal/carer's leave. To the extent the CFW's proposal would involve overlap with the existing hybrid NES personal/carer's entitlement, any purported restriction as to only being able to take NES personal/carer's leave for sick leave *or* carer's leave purposes is likely to contravene s.55(1) of the Act.

598. The Carer's Tasmania Submission proposes that paid carer's leave and paid personal leave be two separate and distinct entitlements. [410]

599. As we explain at [604] below, this is a matter for the legislature and outside the scope of the Review.

600.

[407] SDA Submission at [282].

[408] SDA Submission at [280] – [285] and Recommendation 31 on pages 55-56.

[409] CFW Submission at [36].

[410] Carers Tasmania Submission at pages 9 – 10.

601. Carer's Tasmania also encourages consideration of an entitlement for employees to take leave on full pay to care for a family member at three days per occasion to a maximum of ten days per year,[411] in response to which we repeat and rely on our submission at [593] above.

602. The WFPR Submission proposes an amendment to the NES to separate paid personal (sick) leave and carer's leave entitlements and an increase to the quantum of each set without quantifying the amount it proposes leave should be increased to.[412] Ai Group opposes any increase to the quantum of carer's leave, and relies on its earlier submissions at [510] – [524] above. As to the proposed amendment to the NES, we refer to [604] below.

603. The ASU Submission proposes separate leave entitlements of 10 days' personal leave and 10 days' carers' leave for '*every worker'* and states *'this could be achieved by an award variation supplementing the NES, but this issue may be better addressed through amendments to the Fair Work Act'*.[413]

604. For the reason outlined at [597] above, we consider any attempt to separate sick and carer's leave entitlements in awards to be inherently problematic in the context of its interaction with the existing hybrid NES entitlement. Accordingly, the proposals contended for by Carers Tasmania, the WFPR and ASU concern a variation of the NES and are outside the scope of the Review.

605. The CPSU proposes a separation of personal and carer's leave entitlements for the SCHCDS Award only, with a commensurate increase in paid days.[414] We refer to our earlier comments in the context of specific increases to carer's leave entitlements proposed for employees in the ECEC sector at [520] in response.

[411] Carers Tasmania Submission at pages 9 – 10.

[412] AFPR Submission at [29] and [33](a).

[413] ASU Submission at [43] – [46].

[414] CPSU Submission at page 11.

22. QUESTION 18 – CEREMONIAL LEAVE

606. Question 18 is as follows:

> Are there any specific variations to ceremonial leave provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

607. As identified in the Paper, four of the 25 awards examined contain ceremonial leave provisions, which provide an entitlement of 10 days' unpaid leave.[415] It is not provided for in the NES.

ACTU ([149] – [156] and Recommendation 25)

608. The ACTU Submission proposes that ceremonial leave provisions, including foster and kinship care, be inserted into all awards. It states that a proposed clause will be filed with its reply submissions.[416] We may seek to be heard in relation to it thereafter.

609. We note that providing for foster and kinship care would constitute an expansion of the existing ceremonial leave provision, and the impact upon employers of this expansion would need to be carefully considered.

610. The ACTU submits that the existing ceremonial leave provisions in awards are deficient for a number of reasons. These include concerns that access to the entitlement is subject to unqualified employer approval, and the employee must be '*legitimately required by indigenous tradition*' to be absent from work.[417] In our submission, it is appropriate that there are some limits on when this leave entitlement is available and that it is subject to employer approval. This is consistent with other forms of leave provided for in modern awards, as well as the principle that any absence from work must be approved. We would not support removing the requirement for employer approval from any revised ceremonial leave provision.

[415] Clause 32 of the Aged Care Award, clause 35 of the SCHCDS Award, clause 31 of the HPSS Award, clause 23 of the Nurses Award.

[416] ACTU Submission at [154].

[417] ACTU Submission at [153].

611. The ACTU's submission that a Full Bench of the Commission has previously found an entitlement to ceremonial leave in awards was consistent with s.134(1)(c) of the Act is misleading.[418] In particular, it omits that this part of the decision was in relation to the *Medical Practitioners Award 2010* only, in circumstances where other health sector awards already provided for ceremonial leave.[419] The Commission was satisfied in the circumstances that it was appropriate to insert a ceremonial leave provision in the *Medical Practitioners Award 2010*; specifically, based on the information before it. In our submission, the Commission would need to be similarly satisfied that it was appropriate to insert such provisions into modern awards generally before doing so. We do not consider that the submissions advanced to date as part of the Review demonstrate as much.

612. The ACTU's submission that the Commission should consider a cultural load / cultural responsibility allowance and a language allowance for First Nations employees is not supported.[420] Inserting new allowances into awards will have a clear financial impact on employers. The Commission cannot be satisfied that inserting such provisions into all modern awards is *necessary* for the purposes of s.138 of the Act.

ANMF ([123] – [126])

613. The ANMF submits that the ceremonial leave entitlement in the Nurses Award should be '*expanded*' beyond 10 days and should be a paid entitlement.[421] The ANMF does not propose any limit on the number of days or the amount of payment, beyond noting that some enterprise agreements provide for a 20-day paid entitlement.[422]

[418] ACTU Submission at [152].

[419] *Four yearly review of modern Awards* [2016] FWCFB 7254 at [120] – [126].

[420] ACTU Submission at [156] and Recommendation 25 at page 55.

[421] ANMF Submission at [123].

[422] ANMF Submission at [125].

614. Any variation to the existing entitlement to either extend the period of time available or make it a paid entitlement would have a significant impact on employers. Further, as the ANMF has identified, it is possible for more generous entitlements in this regard to be reached at the enterprise level through bargaining.

615. To the extent that the ANMF submissions repeat concerns raised by the ACTU, including the use of the word '*legitimately*' in the relevant existing ceremonial leave clauses, we rely on and repeat the submissions made at [609] above.[423]

UWU ([46])

616. To the extent that the UWU supports the ACTU submission regarding ceremonial leave, and submits that it should be a paid entitlement, we rely on our submissions above in response to the ACTU and ANMF.[424]

CFW ([35] – [36]) and WFPR ([34] – [35])

617. Both the CFW and the WFPR submit that all modern awards should be varied to include provisions for ceremonial or cultural leave. These submissions are not supported by any proposed clause or other clear rationale. To the extent that they overlap with those earlier identified in response to question 18, we rely on our submissions above.

[423] ANMF Submission at [126].

[424] UWU Submission at [46].

23. QUESTION 19 – OTHER VARIATIONS

618. Question 19 is as follows:

> Are there any other specific variations to modern award provisions that would assist employees meet their caring responsibilities and are necessary to meet the modern awards objective?

Flexible Working Arrangements

619. The ACTU advances various proposals in respect of flexible working arrangements. Similar submissions have been made by the ASU and SDA.

620. The ACTU submits that a *'large percentage of requests for access to family friendly working arrangements are refused, either in whole or in part'*.[425] It does not cite any data or other material in support of this proposition.

621. We contest the ACTU's assertion. It should not be accepted by the Commission. Indeed, the most recent report prepared by the General Manager of the Commission into the operation of s.65 of the Act, contains the following conclusion:

> Most interviewees that responded commented that requests were agreed by employers or agreed following negotiations. Refusals were rare, particularly among employers who provide greater access to flexibility than the statutory provisions. [426]

622. Further, in our experience, employers typically make extensive efforts to facilitate requests for flexible working arrangements, irrespective of whether they are made formally or informally. Whilst we acknowledge that some requests are nonetheless refused, there are necessarily various constraints that genuinely and legitimately do not enable employers to accommodate all requests they receive. This does not represent a failure of the avenues presently available for employees to request flexible working arrangements. Rather, it simply reflects the realities of employers' operational requirements.

[425] ACTU Submission at [50].

[426] Fair Work Commission, *General Manager's report into the operation of provisions of the National Employment Standards relating to requests for flexible working arrangements and extensions of unpaid parental leave under section 653 of the Fair Work Act 2009* (2018 – 2021) at page 20.

623. The ACTU specifically contends that:

(a) Awards should be varied to make the right to request flexible working arrangements available to all employees (Recommendation 6).

(b) Awards should be varied so that employers are required to *'reasonably accommodate flexible working arrangements unless it causes them unjustifiable hardship'* (Recommendation 7).

(c) Employees should have an award-derived right to *'revert back to their former working hours following a period of part-time or reduced hours of work'* (Recommendation 8).[427]

624. We observe first and foremost that it is not clear that the operation of s.65 of the Act can be augmented by award terms of the nature proposed by the ACTU. Careful consideration would need to be given to whether s.55(1) of the Act prohibits at least some elements of what is advanced.

625. In its submission, the ACTU takes aim at the framework for requesting flexible work requests pursuant to the NES. In particular, it complains that not all employees can make a request pursuant to it. The limitations noted by the ACTU as to who has a right to make a request pursuant to s.65 of the Act[428] are appropriate and should not be disturbed. This is particularly relevant given the limited right employers have to refuse requests.

626. The Act identifies groups of employees who, due to their circumstances, may require flexible work arrangements.[429] Plainly, it cannot be said to be *necessary* for the safety net to give an employee a right to request flexible working arrangements to enable them to attend yoga classes every morning, or have breakfast once a week with friends or to finish early on Fridays for no reason other than a personal desire to do so.

[427] ACTU Submission at pages 29 – 31.

[428] ACTU Submission at [54].

[429] Section 65(1A) of the Act.

627. We would strongly oppose any further limits being placed on an employer's right to refuse a request and / or on the creation of an automatic right to revert to former working hours. Both would have significant adverse impacts on employers. They would likely result in serious operational difficulties, impose additional costs, undermine productivity, reduce efficiency and / or increase the regulatory burden. They should not be entertained.

Other Proposals

628. In addition to the raft of claims advanced by the unions in response to the preceding questions posed in the Paper, many have also proposed additional variations in response to question 19.

629. For example:

(a) The ACTU seeks:

(i) Support for breastfeeding and lactation, including paid breaks and appropriate facilities.

(ii) Paid leave to attend appointments associated with pregnancy, adoption, surrogacy and permanent care orders.

(iii) A requirement that an employer demonstrate that a redundancy is bona fide and reasonable accommodations cannot be made, where the redundancy relates to an employee during or returning from parental leave.

(iv) Access to safe, secure and dedicated facilities/equipment for women in male-dominated industries.

(v) Additional pay on termination for employees with parenting responsibilities.

(vi) Paid and unpaid leave for grandparents.[430]

[430] ACTU Submission at [158].

(b) The AMWU submits that consideration should be given to reducing full-time hours to 35. It clarifies that it is not seeking a commensurate reduction to minimum rates of pay.[431]

(c) The SDA submits that the *'breaks provisions'* in the GRIA, FF Award and HABA be amended *'to include a paid break to all employees for every shift worker regardless of shift length'* (Recommendation 19).[432]

(d) The union argues that the Commission should *'consider'* reducing full-time working hours to 35 per week *'at current weekly rates'* and introducing a *'4-day week'* (Recommendation 34).[433]

(e) Finally, the SDA submits that awards should:

(i) Include paid breaks for breastfeeding and / or expressing;

(ii) Include a right to *'appropriate facilities'* for the purposes of breastfeeding and / or expressing;

(iii) Provide that periods of paid and unpaid parental leave count as service *'for accrual purposes'*;

(iv) Provide paid pre-natal, pre-adoption and pre-placement leave; and

(v) Provide 40 weeks of unpaid leave and 12 weeks of paid leave to grandparents, for each grandchild, during the period up to the child's 5th birthday (Recommendation 35).[434]

[431] AMWU Submission at [39] – [44] and Recommendation 6.

[432] SDA Submission at page 32.

[433] SDA Submission at page 57.

[434] SDA Submission at page 57.

(f) The ASU puts various aspects of the SCHCDS Award in issue, including *'unpaid'* travel time arrangements, sleepover arrangements, *'unpaid'* administrative work and the role of funding bodies in future modern award proceedings.[435]

(g) It also seeks variations to the model consultation term regarding changes to regular rosters and ordinary hours of work,[436]

(h) The ASU further submits that compassionate leave entitlements should be increased.[437]

(i) The HSU seeks variations to the HPSS Award *'to make clear that broken shifts are expressly prohibited, and to introduce some minimum rest break periods between rostered shifts'*.[438]

(j) It also proposes variations requiring the payment of the casual loading in addition to weekend and public holiday penalty rates under the Aged Care Award and HPSS Award.[439]

(k) The CPSU argues that the provision that contemplates sleepovers should be deleted from the SCHCDS Award or in the alternate, it should be substantially varied.[440]

(l) The ANMF proposes that all awards be varied *'to provide reasonable paid break time for employees to express breast milk each time they need to within the workplace'*, with a corresponding requirement on the employer to *'also provide a comfortable and clean place … that is shielded from view and free from intrusion from co-workers and the public'*, as well as

[435] ASU Submission at [14].

[436] ASU Submission at [33].

[437] ASU Submission at [47].

[438] HSU Submission at [44].

[439] HSU Submission at [74] – [77] and Proposal 6.

[440] CPSU Submission at [54].

'appropriate refrigeration in proximity to the area for breast milk storage'.[441] The ASU has made a similar submission.[442]

(m) The ANMF also expresses its *'support'* for a *'gradual reduction of maximum ordinary hours'*.[443]

630. We advance the following short submission in response:

(a) Plainly, these claims (separately and together) are of a substantial nature. They would introduce significant new entitlements and in turn, further impose on employers in countless ways.

(b) This process will not allow for a proper examination of the merits or otherwise of any of these claims.

(c) In the time available, it has not been feasible to prepare detailed submissions in response to the various elements of the unions' proposals.

(d) It is not clear that all of the proposals are in fact directed towards balancing work and care (e.g. the introduction of new meal and rest break provisions).

631. Accordingly, and for the reasons we set out in Chapter 1 of this submission, these claims should not be endorsed or adopted by the Commission in this Review.

[441] ANMF Submission at [129] – [130].

[442] ASU Submission at [49].

[443] ANMF Submission at [133].