

IN THE FAIR WORK COMMISSION

Matter No.: AM2023/21

Matter: Modern Awards Review 2023-24 – Work and Care

Reply Submissions of the CPSU (PSU-Group)

Background

1. On 24 November 2023, Fair Work Commission (FWC) President Hatcher announced that as part of the Modern Awards Review 2023-24 (Awards review), a literature review would be conducted by Western Sydney University to support the research and consultation into the work and care stream of the Awards review.
2. On 8 March 2024, the FWC released the literature review. The purpose of the literature review was to analyse existing literature on modern awards and its impact on work and caring responsibilities, identify and synthesise key findings, trends and emerging themes in the field, as well as analyse existing literature to highlight various factors influencing the relationships between modern awards and employees' abilities to balance their caring responsibilities.
3. In the FWC's statement of 29 January 2024, FWC Deputy President O'Neill invited parties to make submissions in reply to the literature review. The CPSU makes this submission in response to that review and to submissions made in the 'Work and Care' stream, pursuant to the timetable set out in the Full Bench's statement of 4 October 2023.
4. On 12 March 2024, the CPSU-PSU Group made a submission to the FWC in response to the Fair Work Commission's Discussion Paper on Work and Care. We rely on that submission which addresses issues from the Discussion Paper and that may be directly relevant to proposals raised by employers rather than repeat earlier arguments. The CPSU submits the literature review broadly supports recommendations made by the union in its earlier submission.

5. The CPSU endorses the ACTU's submissions and recommendations.

Senate Select Committee on Work and Care

6. The Senate Select Committee on Work and Care was appointed by resolution of the Senate on 3 August 2022 to inquire into the impact that combining work and care responsibilities has on the wellbeing of workers, carers, and those they care for.¹
7. In correspondence to FWC President Hatcher, the Minister for Employment and Workplace Relations, the Hon Tony Burke, MP, suggested a key priority of the review is considering the impact of workplace relations settings on work and care, having regard to the relevant findings and recommendations in the Senate Select Committee on Work and Care Final Report.²
8. The CPSU opposes submissions made by employer groups that the Senate Select Committee on Work and Care Report cannot be relied on by the FWC because of an imbalance between employee and employer perspectives. That the perspectives of workers or employees was central to the work of the committee does not render the report irrelevant to the FWC's considerations.
9. Section 134 of the *Fair Work Act 2009* (FW Act) sets out the modern awards objective as that the FWC must ensure modern awards, along with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account a range of considerations. The safety net provided by awards sets out minimum pay and conditions for employees. The perspectives of employees are central to variations to modern awards if their objective is to provide this safety net for employees.
10. The CPSU supports the recommendations of the Senate Select Committee on Work and Care Final Report and submits these recommendations should bear considerable weight in the FWC's considerations.

¹ https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Work_and_Care/workandcare

² FWC Work and Care Discussion Paper paragraph [2]

Gender equality

11. Relevant to the Awards review is the amended modern award objective set out at section 134(1)(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..

12. It is evident from the literature review that the literature supports varying modern awards to support employees balancing work and care, and that doing so would work to address gender equality in the workplace. For example:

- a. There are consistent findings in the literature suggesting that the sharing of work and care is primarily the responsibility of women for whom paid work should be adjusted to fit around their care responsibilities.³
- b. Gendered social norms, including about women's role in unpaid care, have an important role in explaining the persistent gender gap in the different forms of employment participation by men and women.⁴
- c. A study by Carers Australia found that in 2021 female carers were less likely to be in paid employment than male carers and, where they were employed, female carers were more likely than male carers not to have access to any flexibility of working hours.⁵

13. As set out in the CPSU's earlier submission, there is considerable scope for variation to modern award provisions that may better allow employees to balance their work and caring responsibilities. The CPSU submits the literature supports these variations being made to achieve the modern awards objective under s134 of the FW Act.

³ Literature review, page 8, reference [2]

⁴ Ibid, page 19, reference [93]

⁵ Ibid, page 19, reference [90]

Employment type

14. The literature review suggested that for parents, there is a “complex relationship between paid work, child care and family circumstances”⁶ in making decisions about how they engage in employment. A study was cited that found parents ‘who have more control over their work hours are likely to have fewer difficulties in managing child care compared to others’.⁷
15. The CPSU submission outlined that the number of women working part-time has steadily increased in the APS over the last 20 years. Similarly, the literature review found that women, particularly those with care responsibilities, are more likely to engage in short hours part-time or casual work.⁸
16. The CPSU submitted that safeguards for part time employees, such as minimum engagements and overtime for work outside their agreed hours, should be set out in modern awards.
17. The literature review found that artificially low or zero hours contracts and low minimum engagement periods contribute to inferior working time standards and an absence of hours and income continuity.⁹
18. Part time employees should have certainty in the hours they work and appropriate penalties paid where they work additional hours.
19. The literature review highlights the impact of differences in the regulation of the hours of work for part-time and casual employees compared to full-time employees. The authors propose existing arrangements enable low minimum engagements and low hour

⁶ Ibid, page 19

⁷ Ibid, page 21, reference [105]

⁸ Ibid, page 58

⁹ Literature review, page 39

contracts which contribute to underemployment and the requirement for employees to be available and flexible in order to secure additional hours.¹⁰

Working hours when working from home

20. The Ai Group and ACCI submissions propose modern awards should be varied so that where an employee is working from home, the employee can agree that the span of hours provisions under an award not apply, or are otherwise varied. The CPSU opposes these submissions and is of the view that variations of this nature seek to undermine the safety net provided by awards.
21. The CPSU supports variation to modern award provisions that provide for access to working from home. The inclusion of new working from home provisions should not reduce and/or disturb long-standing award provisions that safeguard an employee's right to reasonable working hours and access to overtime and/or penalty provisions for working additional or unsociable hours.
22. There are a number of studies that suggest that reconciliation of work and care is especially difficult to achieve for parents working nonstandard hours.¹¹
23. The findings of the literature review do not support Ai Group and ACCI's submissions in this respect. Notably the review demonstrated that long hours are challenging to combine with care¹² and working from home may render employees' care responsibilities invisible to employers.¹³
24. The literature review found that 'flexibility stigma'¹⁴ can impact the career prospects of employees who access flexible working arrangements. The CPSU submits changes to the flexible work terms as recommended in the union's earlier submission and the inclusion of working from home terms in modern awards will ensure that workplace

¹⁰ Ibid, page 37

¹¹ Ibid, page 95

¹² Ibid, page 38

¹³ Ibid, page 35

¹⁴ Literature review, page 14

culture around flexible working will better reflect current community norms and expectations.

25. The literature review notes that the provisions in s65 of the FW Act exclude workers on casual or shorter-term employment, when it is more likely that women will be casually employed.¹⁵ This supports the CPSU recommendation that these terms should apply to all employees.

Leave entitlements

26. The CPSU submission at paragraph 81 recommended modern awards should include a broad definition of family to enable better access to leave and flexible working arrangements.
27. The literature review proposed 'eligibility requirements should also be inclusive of diverse families and household situations, difference cultural practices and support shared care within families and communities.'¹⁶
28. The literature supports the CPSU submission that a broad, inclusive definition of family should be included in modern awards. Broad provisions for personal and carer's leave that have a flexible approach and acknowledge a wide range of caring responsibilities should be included in modern awards.
29. The literature review notes a frequent criticism in the material reviewed is that,

"access to paid and unpaid carer's leave is limited to immediate family and household members only. It is argued that access to leave should support worker-carers with different care responsibilities and be inclusive of work-care requirements across the life course, and also include activities associated with the organisation of formal and informal care".¹⁷

¹⁵ Ibid, page 30

¹⁶ Ibid, page 50, reference [235]

¹⁷ Ibid, page 62

30. A broad definition of family that recognises a diverse range of caring arrangements is clearly supported by the literature and the CPSU submits should be included in modern awards.
31. Parental leave did not form part of the FWC Discussion Paper questions but is briefly explored in the literature review.
32. The *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act* introduced greater flexibility in the taking of unpaid parental leave under the NES.
33. In 2023 the CPSU secured a common parental leave clause across APS enterprise agreements that allows employees to take paid parental leave flexibly over a 24-month parental leave period. A copy of this term is attached at Attachment A.
34. As is already referenced in this submission, gendered social norms impact the way that men and women participate in employment.¹⁸
35. Parental leave terms in modern awards that enable flexibility and shared responsibility between parents works to address gender equality in the workplace.

Conclusion

36. The CPSU submits the literature review supports recommendations made in the CPSU submission of 12 March 2024.
37. The recommendations of the Senate Select Committee on Work and Care and the amended modern awards objective to 'achieve gender equality', give rise to the need to vary modern awards to support employees balancing work and care.

¹⁸ Literature review, page 19, reference [93]

Attachment A

Parental leave

57. A primary caregiver, secondary caregiver and ML Act is defined in the definitions section.
58. An employee who is a **primary caregiver** or **secondary caregiver** is entitled to parental leave up until 24 months from the date of the child's birth or placement (**parental leave period**). For the avoidance of doubt, this is inclusive of all legislated leave entitlements. The parental leave period does not extend non-ongoing employment where the employment period remaining is less than 24 months. An employee is only eligible for parental leave with pay as either a primary caregiver or a secondary caregiver for the particular parental leave period, and cannot switch roles for the purpose of accessing additional paid leave.
59. For the pregnant employee, the parental leave period starts on commencement of maternity leave as per ML Act requirements, and ceases 24 months from the date of birth. Medical certification requirements for the pregnant employee will be as required by the ML Act.
60. Conditions in this agreement will continue to apply in circumstances where successor legislation to the ML Act does not provide parental leave conditions included in this agreement.

Payment during parental leave

61. An employee is entitled to parental leave with pay as per clauses 58 to 59 [An employee who is a primary caregiver is entitled to parental leave with pay...] below within the parental leave period. Any further parental leave during the parental leave period is without pay. Unused paid parental leave remaining at the end of the employee's parental leave period will lapse. An employee may choose to use their accrued paid leave entitlements in accordance with usage and eligibility requirements in this agreement during the parental leave period that would otherwise be without pay.

62. Employees newly engaged in the agency or who have moved to <the agency> from another APS agency are eligible for the paid parental leave in clauses 58 to 59 [An employee who is a primary caregiver is entitled to parental leave with pay...] where such paid leave had not already been provided by another APS agency or Commonwealth employer in the 24 months since the child’s date of birth or placement. If the paid leave used by the employee with the previous Commonwealth employer or APS agency is less than the limits specified in clauses 58 to 59 [An employee who is a primary caregiver is entitled to parental leave with pay...], the balance is available to the employee.
63. An employee who is a primary caregiver is entitled to parental leave with pay during the parental leave period to a maximum of 18 weeks as provided in **Table 2 [Primary caregivers – circumstances for paid parental leave]** below.

Table 1: Primary caregivers - circumstances for paid parental leave

Paid leave entitlement under the ML Act	Additional parental leave with pay under this agreement for the primary caregiver
12 weeks’ paid maternity leave, including any reduced paid maternity leave period due to ML Act qualifying period rules	Paid leave to bring the total period of paid parental leave to 18 weeks
No ML Act eligibility or coverage	18 weeks

64. An employee who is a secondary caregiver is entitled to parental leave with pay during the parental leave period as provided in **Table 3 [Secondary caregivers – circumstances for paid parental leave]** below.

Table 2: Secondary caregivers - circumstances for paid parental leave

Period which coincides with the parental leave period for the secondary caregiver	Parental Leave with pay under this agreement
Date of commencement of this agreement to 28 February 2025	8 weeks, or top up to 8 weeks where a lesser period of parental leave has already been provided
1 March 2025 to 28 February 2026	11 weeks, or top up to 11 weeks where a lesser period of parental leave has already been provided
1 March 2026 to 27 February 2027	14 weeks, or top up to 14 weeks where a lesser period of parental leave has already been provided

Period which coincides with the parental leave period for the secondary caregiver	Parental Leave with pay under this agreement
On and from 28 February 2027	18 weeks, or top up to 18 weeks where a lesser period of parental leave has already been provided

65. **Flexibility:** Parental leave with pay, whether provided as maternity leave under the ML Act or under this agreement, can be accessed flexibly during the parental leave period and does not have to be taken in a single block. For the avoidance of doubt, parental leave can be used to replicate a part time work arrangement, and can be taken concurrently with another parent in relation to the same child.
66. **Rate of payment** during paid parental leave is the same as for an absence on personal/carer's leave and based on the employee's weekly hours at the time of the absence.
67. **Half-pay option:** The payment of any paid parental leave may be spread over a maximum period of 36 weeks at the rate of, no less than, half the normal rate of salary. All paid parental leave counts as service for all purposes, where permitted by legislation.

Adoption and long-term foster care

68. An employee who is a primary caregiver or secondary caregiver is entitled to parental leave in accordance with this agreement for adoption or long-term foster care, provided that the child:
- 68.1 is under 16 as at the day (or expected day) of placement;
 - 68.2 has not lived continuously with the employee for a period of six months or more as at the day (or expected day) of placement; and
 - 68.3 is not (otherwise than because of the adoption) a child of the employee or the employee's spouse or de facto partner.
69. Documentary evidence of approval for adoption or enduring parental responsibilities under formal fostering arrangements must be submitted when applying for parental leave for adoption or long-term foster carer purposes.

Stillbirth

70. Parents of a stillborn child remain eligible for parental leave, except for paid leave for the secondary caregiver which is two weeks.
71. A stillborn child is a child:

- 71.1 who weighs at least 400 g at delivery or whose period of gestation was 20 weeks or more; and
- 71.2 who has not breathed since delivery; and
- 71.3 whose heart has not beaten since delivery.

Pregnancy loss leave

- 72. A pregnant employee who experiences, or an employee whose spouse or partner experiences, pregnancy loss is entitled to one weeks' paid leave. Pregnancy loss is a miscarriage or other loss of pregnancy that occurs between 12 and 20 weeks' gestation that is not a stillbirth.
- 73. Pregnancy loss leave is in addition to entitlements to compassionate leave for miscarriage provided under the FW Act and this agreement.

Premature birth leave

- 74. In circumstances of a live birth before 37 weeks' gestation a pregnant employee, or an employee whose spouse or partner has given birth prematurely, is entitled to paid premature birth leave from the date of the child's birth up to just before 37 weeks' gestation. Parental leave with pay is then available from what would have been 37 weeks' gestation in accordance with Parental leave in this agreement, noting the parental leave period commences on the child's date of birth.

Transitional provisions

- 75. Employees eligible for paid leave under the ML Act are required under legislation to use their paid maternity leave first. In this circumstance, the employee may postpone their paid premature birth leave otherwise payable under clause 74 [In circumstances of a live birth before 37 weeks' gestation...] until after the legislated paid maternity leave is used.