



Modern Awards Review 2023-24 (AM2023/21)

Submission cover sheet

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(Please provide the name of the person lodging the submission)

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(If this submission is completed on behalf of an organisation or group of individuals, please provide details)

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How to prepare a submission

Submissions should be emailed to awards@fwc.gov.au. Directions set out the due dates for submissions. Directions are issued by a Member of the Commission and will be published on the [Commission website](#).

Make sure you use numbered paragraphs and sign and date your submission.

Your submission. Provide a summary of your experience and any relevant issues. You may wish to refer to one or more of the issues outlined in the relevant discussion paper.

Signature: 

Name: Claire Gray-Starcevic

Date: 5 February 2024

IN THE FAIR WORK COMMISSION

Matter No: AM2023/21

Modern Awards Review

SUBMISSIONS OF THE UNITED WORKERS UNION

1. The Modern Awards Review 2023-24 includes as an area of focus a stream concerning job security and the need to improve access to secure work across the economy. This area of the Review is focused on the seven most commonly used awards, of which UWU has a particular interest in several, namely:
 - a. Children's Services Award 2010 (**CS Award**)
 - b. Hospitality Industry (General) Award 2020 (**HIG Award**)
 - c. Restaurant Industry Award 2020 (**RI Award**)
 - d. Social, Community, Home Care and Disability Services Industry Award 2010 (**SCHADS Award**).

The consultation process

2. The Commission has set aside four days for the consultation process. UWU can attend any and all of these days either in person or remotely.
3. It may be appropriate for the Commission to devote particular days to discussions about particular Awards which would allow parties to attend only on days devoted to those Awards in which they have an interest.

Discussion questions - summary

4. These submissions deal with some of the questions posed by the Commission in the Discussion Paper¹. In summary:

Discussion paper question	UWU answer
Question 1 – are these specific provisions in the seven modern awards the subject of this review that parties consider are necessary to improve access to secure work across the economy?	Yes. At this stage, UWU notes in particular several examples of Award clauses which are necessary to improve access to secure work, including (a) clauses limit the use of casual engagement (such as Cl.10.5(b) of the CS Award (b) clauses which limit the circumstances in which rosters may be changed (such as cl.21.7(b)(iii) of the CS Award), (c) clauses that provide for guaranteed minimum hours (such as clauses 10.4 of the HIG Award and the RI Award), (d) and clauses which provide for minimum engagement periods
Question 2 - Are there any <u>additional</u> specific award provisions that are consistent with the new modern awards objective?	Yes. UWU proposes that the issue of unpaid work associated with matters such as medical testing and training be addressed.

¹ Discussion Paper – Job Security, Modern Awards Review 2023 – 24, Fair Work Commission, 18 December 2023.

Discussion paper question	UWU answer
Question 3 - Are there specific award provisions that are <u>not</u> consistent with the modern awards objective?	Yes. At this stage, UWU submits that the clauses 10.4 of the HIG Award and the RI Award are not consistent with the modern awards objective.
Question 4 - Having regard to the new modern awards objective, should the exclusion of casual employees from accessing certain NES entitlements (such as paid personal leave) continue)?	UWU supports submissions made by ACTU in relation to this matter
Question 5 - Should any of the awards be varied to supplement these NES entitlement gaps for casual employees?	UWU supports submissions made by ACTU in relation to this matter
Question 6 - Is there evidence that use of individual flexibility arrangements undermines job security?	At this stage UWU has not identified any such evidence
Question 7 - Having regard to particular modern award standard clauses, (a) are provisions of the standard clauses consistent with the new modern awards objective, (b) do any of the standard clauses negatively impact job security (c) do any or any part of the standard clauses prevent or limited access to	Yes. The incorporation by reference of the exception to redundancy pay in s 119(1)(a) of the Act negatively impacts job security

Discussion paper question	UWU answer
secure work or enhance access to security work?	
Question 8 - Are there variations to the standard clauses that could improve access to, or remove barriers to accessing, the standard clauses by employees who are vulnerable to job insecurity?	At this stage, UWU does not propose any specific variations

Current award provisions necessary to improve access to secure work.

5. There are a number of provisions in Awards that improve access to secure work. At this stage of the review UWU notes in particular the following provisions.

Types or Modes of Employment

6. Some Award clauses which establish types of modes of employment limit the circumstances in which casual engagement may be used. These provisions are important in increasing the incidence of more secure forms of employment, such as full or part time engagements. Clause 10.5 of the CS Award provides as follows:

10.5 Casual employment

- (a) ...
- (b) *A casual employee may be engaged only for temporary and relief purposes.*
- (c) ...

7. Only 21.7 per cent of employees covered by the CS Award are engaged on a casual basis. Under Awards such as the HIG Award or the RI Award, in which no such limitation exists, the incidence of casual engagement is much higher (81.7% and 86.8% respectively)².

Rosters

8. Many Awards permit a roster to be changed with the provision of notice, or without notice, in the case of emergency. Award provisions which define and confine the concept of an “emergency” are important in relation to job security and secure employment.
9. For example, clause 21.7(b)(iii) of the CS Award provides that it is *not* an emergency if an employee is required to stay beyond their rostered hours because a parent fails to arrive on time to collect a child.

Guaranteed minimum hours

10. Award provisions that contain guaranteed number of minimum weekly hours are important in relation to job security and secure employment. The HIG Award and RI Award contain provisions guaranteeing a minimum of 8 hours per week to part-time employees.³

Minimum engagement/payment periods

11. As outlined in *Re Victorian Employers’ Chamber of Commerce and Industry*,⁴ minimum engagement periods are an important mechanism for “protecting employees from unfair prejudice or exploitation”.⁵ The rationale for minimum engagement periods recognises the time, monetary cost and inconvenience associated with each attendance at work and is essentially “to ensure that the employee receives a sufficient amount of work, and income, for each

² We note industries covered by the CSI Award and HIGA are among the most feminised industries in Australia: Natasha Cortis, Yuvisthi Naidoo, Melissa Wong and Bruce Bradbury: “Gender-based occupation segregation: a national data profile” (Social Policy Research Centre, University of New South Wales, Sydney, 6 November 2023) pp 8-9. It has been recognized that the increase of women in the workforce has contributed to the rise of non-standard employment and that working carers are more likely to be in insecure work: Senate Select Committee Report on Job Security, The Job Insecurity Report, February 2022 at [11.7].

³ HIG Award clause 10.4; RI Award clause 10.4

⁴ [2012] FWAFB 6913.

⁵ Ibid at [12].

attendance at the workplace to justify the expense and inconvenience associated with that attendance...”⁶

12. In light of the above accepted purpose of minimum engagement periods, it is readily apparent that for minimum engagement provisions to achieve their accepted purpose, the minimum engagement provided for in an award must:

- a. Be of a sufficient length to justify the time and cost of each work attendance; and
- b. Only be satisfied through consecutive hours of work (in contrast to a broken shift over the entirety of a day).

13. Provisions within certain awards⁷ that clarify the minimum engagement is to be on consecutive hours, or for each component of a broken shift⁸ are to be preferred over those that do not contain this clarification.⁹

Additional Award provisions

14. An emerging issue for UWU members, particularly in the Aged Care industry, is the increasing prevalence of being required to undertake work-related activities outside of work hours. These work-related activities relate primarily to:

- a. Online mandatory training; and
- b. Rapid antigen testing

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

⁷ HIG Award cl 11.3 (in relation to casual employees); RI Award cl 11.3 (in relation to casual employees); CSI Award cl 10.4(d)(e) (in relation to part-time employees).

⁸ SCHADS Award cl 10.5.

⁹ E.g. for part-time workers under HIG Award (clause 15.2(c)); for casuals under CSI award (cl 10.5(c)); for part-time workers under RI Award (clause 10.7(b)).

15. There is not a consistent approach among employers within the industry around the payment made to employees undertaking these activities. Recent decisions¹⁰ suggest that certain activities do not warrant payment under the current industrial instruments, or otherwise that performance of these activities will not attract minimum payment terms or penalty rates, such as overtime.¹¹
16. Currently, UWU members within aged care do not receive penalty rates, overtime or the minimum engagement payment term for the time spent completing online training modules at home, on their own time.
17. The way these work-related activities are rostered and paid is of particular relevance to the job security of workers in aged care, who are predominantly women and are often balancing caring responsibilities with part-time or casual employment.
18. The Final Report of the Select Committee on Work and Care¹² notes that the question of working time, in relation to its security, predictability, length, flexibility, intensity and fit with care obligations, “emerged as amongst the most pressing and most frequently mentioned matters before the committee”.¹³
19. Employees required to complete online training modules at home and outside of their standard rostered hours (which often under the relevant award are agreed in writing at the commencement of employment, including the start/finish times, hours of work and days of the week), must find additional time in their personal lives to perform work. This can include taking

¹⁰ *ANMF v Johnston Stenner Aged Care Pty Ltd* [2023] FWCFB 162.

¹¹ *Ibid* at [31]. See also: *HSU v Menarock Aged Care Services (Claremont) Pty Ltd T/A Menarock* [2023] FWC 1229.

¹² Senate Select Committee Report on Work and Care *Final Report*, March 2023.

¹³ At [6.1]

time out on rostered days off, going to bed late or getting up early to complete training before or after work, having to enlist another parent, family member or friend to watch children while the training is completed and incurring the cost of Wi-Fi and/or data usage, among other inconveniences.

20. Such an arrangement, when it is either unpaid or paid at ordinary time rates, undermines the security otherwise provided for part-time employees under their relevant award as they relate to agreed start/finish times, hours of work and notice for changes to their roster. This results in a lack of predictability around their hours of work which undermines the modern award objective of secure employment, particularly as it relates to working carers.

21. Additional award provisions clarifying the status and payment of these kinds of activities would be consistent with the modern awards objective.

Award provisions not consistent with the modern awards objective

22. The amendment of s 134 of the Act to include the need to improve access to secure work across the economy brings into question several provisions in Awards that had previously been thought to be consistent with the modern awards objective. At this stage of the review process, Uwu notes in particular the part-time “flexibility” provisions in the HIG Award and the RI Award.

Available hours versus prescribed hours

23. Most Awards provide that in respect to a part time employee, at the time of engagement the employer and the part time employee will agree in writing on a regular pattern of work specifying at least the hours worked each day, which days of the week the employee will work and the actual starting and finishing times each day¹⁴.

¹⁴ These principles were established in the *Award Simplification Decision* [1997] M Print P7500 which used as its test case Award the predecessor to the current Hospitality Award - the *Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1995*. The principles were re-affirmed in the *Award Modernisation Decision*

24. By contrast, the HIG Award and the RI Award both provide that at the time of engagement, a part time employee will agree in writing on the number of hours of work the employee is guaranteed to be provided with over a roster cycle and on the days of the week during which an employee is available to work¹⁵. This allows for and encourages a part-time employee's ordinary hours of work and the days upon which they are worked being subject to significant variation from week to week (somewhat akin to casual engagement).
25. The inclusion of these provisions in these Awards was based on part in the very high incidence of casual employment in these industries, and a prediction that a form of flexibility such as this might increase the incidence of part time employment and decrease the incidence of casual employment¹⁶. However, there is very little evidence that the changes have had this effect – the incidence of casual employment in these industries remains very high (see [7] above) and has not been impacted upon since the change was made.
26. If this approach to part time engagement, which contrasts with many other Awards, has not had its desired effect to increase the incidence of part time engagement and reduce casual engagement, all it does is make the part time employment that does occur under these Awards a less secure form of employment. UWU submits that these provisions are no longer consistent with the modern awards objective.

Standard clauses in Awards

Redundancy clause

27. Most awards, including the awards in focus, refer to the National Employment Standards in relation to redundancy. Thus, our critique as follows relates more to a part of the NES than it does a standard or model Award clause.
28. Clause 19 of the SCHADS Award, Clause 12 of the CS Award, clause 36 of the RI Award and clause 42 of the HIG Award each provide that redundancy pay is provided for in the NES, and

in which the Full Bench said “Traditionally, a part time employee is entitled to employment that carries with it a “degree of regularity and certainty of employment” and that it “should be akin to full-time employment in all respects except that the average weekly ordinary hours are fewer than 38”.

¹⁵ Clause 10.4, HIG Award; Clause 10.4, RI Award

¹⁶ *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [524] – [526]

deal only with matters such as transfer to low paid duties on redundancy, employees leaving during their notice period and job search entitlement in the Awards themselves.

29. Section 119(1) of the Act provides,

(1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:

(a) At the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or

(b) Because of the insolvency or bankruptcy of the employer.

30. This means that that an employee who would otherwise be entitled to be paid redundancy pay is not so entitled if the termination of their employment occurs due to the "ordinary and customary turnover of labour". This does not promote secure employment and has the effect of encouraging insecure employment.

31. The term "ordinary and customary turnover of labour" is confusing, and has resulted in significant litigation, most recently in *United Workers Union v Compass Group Healthcare Hospitality Services Pty Ltd*¹⁷. The litigation relates to attempts by employers (often unsuccessful) to exclude employees' entitlements to be paid severance pay if their employment is made redundant as a result of their employer losing a contract in respect of which they have employed an employee, even in circumstances where those employees are of long standing and engaged in what appeared to them to be secure and permanent employment. When the exception is used successfully by employers to avoid paying redundant employees severance pay, those employees are deprived of an important element the suite built into our system to protect and compensate them for the effects of threats to the security of their employment.

Filed by United Workers Union

5 February 2024

¹⁷ [2023] FCAFC 92; Note this decision was the subject of an appeal, in respect to which the High Court refused to grant leave: *Compass Group Healthcare Hospitality Services Pty Ltd & Anor v United Workers' Union* [2023] HCSL 178