

**MODERN AWARDS REVIEW 2023-24  
(AM2023/21)**

**SUBMISSION COVER SHEET**



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**Modern Award Review Stream:**

Arts and Culture:

Job Security:

Work and Care:

Usability of awards:

**IN THE FAIR WORK COMMISSION**

Matter No: AM2023/21

Modern Awards Review 2023-24

**SUPPLEMENTARY SUBMISSION OF THE AUSTRALIAN SERVICES UNION  
Making Awards Easier to Use**

**Introduction**

1. The Australian Services Union ('ASU') makes this supplementary submission in the Modern Award Review 2023 – 2024 ('Review') with respect to Item 4 'Ease of Use'. It is made pursuant to the Consultation held by Justice Hatcher on 13 March 2024 at the Fair Work Commission ('Commission') in relation to the following awards:
  - a. *Social, Community, Home Care and Disability Services Industry Award 2010* ('SCHDS Award') and
  - b. *Clerks Private Sector Award 2020* ('Clerks Award').
2. This submission addresses issues raised by the Commission during those proceedings.

**Social, Community, Home Care and Disability Services Industry Award 2010**

*Award Title*

3. At the Consultation, the Australia Workforce Compliance Council ('AWCC') proposed to vary the title of the SCHDS Award.
4. The ASU would support the title '*Social, Community and Disability Services Award*'.

*ERO, Salaries and Classifications*

5. We note the Commission's comments about the implications of the Aged Care Work Value Case for the SCHDS Award classification structure. We agree with the Commission's proposal not to address these issues under the Ease-of-Use topic. The ASU is considering its response to the Commission's decision in the Aged Care Work Value Case.

*Meal Allowance*

6. AWCC proposed a variation 20.5(c) of the SCHDS Award. The variation proposed to remove the employer's obligation to pay a meal allowance on the same day that overtime is worked.
7. We have examined the application of the entitlement and can find no evidence that the meal allowance is paid on the same day that overtime is worked, but could not rule it out.

*Annualised Salaries for full-time employees*

8. Ai Group has proposed including an annualised salary arrangement in the SCHDS Award.
9. We oppose any annualised salary arrangement related to part-time employees.

10. His Honour invited the ASU to provide our views on whether the model term developed in the *4 yearly review of modern awards—Annualised Wage Arrangements (AM2016/13)* should apply to full-time employees.
11. The ASU opposes the introduction of annualised salary arrangements in the social, community and disability sectors. The social and community sector is characterised by complex shift work rostering arrangements. Employees often work in workplaces that operate 24 hours a day, seven days a week with rosters that change regularly.
12. This is reflected in the unique terms of the SCHDS Award. Clause 25 provides a variety of roster complexities that are not easily overcome with annualised salaries, including but not limited to, changes in rosters, client cancellations, broken shifts, sleepovers, 24-hour care, excursions and remote work. In this context, the model annualised wage arrangement could not be implemented without significant modifications. In any case, such a term would be administratively burdensome in practice and would likely lead to underpayments.

#### *Changes in Rosters*

13. AWCC proposed a variation that includes an amendment in provision in cl. 25.d(ii) that is *‘where an employee is not provided seven days’ notice, the employee can refuse to work the additional hours requested.’*<sup>1</sup>
14. The ASU took a question on notice on how the proposed provisions interact with full-time employees and other award provisions.
15. The plain meaning of the proposed change would require an employee to accept additional hours of work where they are given seven days’ notice of those additional hours. The ASU would oppose a variation to that effect because it would reduce employee entitlements.
16. We note that under clause 10.3(f), *‘an employer must not require a part-time employee to work additional hours in excess of their guaranteed hours. However, an employee may agree to work hours that are additional to their guaranteed hours’*. The AWCC proposal would limit this right.
17. Further, these words exclude the NES. Under s 62(2) of the FW Act, employees have a right to refuse unreasonable additional hours. This may include additional hours where the employee has had more than seven days’ notice.
18. We believe that the intent of the proposal is to clarify that an employee is not obliged to accept a roster change with less than seven days’ notice. We would propose this alternative

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<sup>1</sup> Australian Workforce Compliance Council, *‘AWCC Submission Part: Marking awards easier to use – part of the Modern Awards Review 2023 – 2024’* Submission to the Fair Work Commission Modern Award Review 2023-2024, 2 February 2024 [92].

form of words:

*Where an employee is not provided seven days' notice of a change of roster, the employee can refuse to work the changed hours of work.*

*Time Off Instead of Payment for Overtime*

19. Clause 28.2 provides that time off instead of payment for overtime ('TOIL') under that term must be taken within a 3-month period after the overtime is worked.
20. When the SCHDS Award was made in 2009, it included a TOIL term that provided that time off should be taken within three months of it being accrued, otherwise it would be paid at the ordinary rates. It appears to be a balance of regulation decision.
21. At that time, clause 28.2 provided as follows:
  - 28.2 Time off instead of payment for overtime**  
*By mutual agreement, an employee may be compensated by way of time off instead of payment of overtime (time for time) on the following basis:*
  - (a) *time off instead of payment for overtime must be taken at ordinary rates within three months of it being accrued;*
  - (b) *where it is not possible for an employee to take the time off instead of payment for overtime within the three month period, it is to be paid out at the appropriate overtime rate based on the rates of pay applying at the time payment is made; and*
  - (c) *an employee cannot be compelled to take time off instead of payment for overtime.*
22. Clause 28.2 was considered by the Award Flexibility Full Bench during the Four Yearly Review of Modern Awards. The controversy during that matter concerned the rate of payment when overtime was paid out.<sup>2</sup> It does not appear that the Full Bench considered changing the period within which TOIL should be worked, nor did any party advance submissions to this point.
23. The Full Bench varied the SCHDS Award in December 2016 to include the current TOIL Term.<sup>3</sup> In that Decision, the Commission noted that it had corrected a typographical error in the SCHDS Award draft determination, which referenced a 6-month period to take time off.<sup>4</sup>
24. The ASU would oppose any variation to the period within which TOIL must be taken.

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<sup>2</sup> [Submission of the ASU](#) dated 23 December 2015.

<sup>3</sup> *4 yearly review of modern awards—Award flexibility* [2016] FWCFB 7737

<sup>4</sup> *Ibid.* See footnote 16.

## Clerks Private Sector Award 2020

### *Working Ordinary Hours on the Weekends*

25. Ai Group proposed a variation to cl. 13.3 of the Clerks Award. We understand that Ai Group seeks to vary the Clerks Award to resolve whether a day worker can be engaged on weekends at ordinary rates. Ai Group proposes that 'ordinary hours may be worked between 7.00 am and 7.00 pm on Monday to Sunday'.
26. The ASU opposes the AIG proposal. Day workers and shift workers can work ordinary hours on Saturdays and Sundays, depending on the circumstances. No variation is necessary to further permit ordinary hours on Saturdays and Sundays, the penalty rates that apply need not be varied. There is no ambiguity or ease of use outcome achieved by varying the penalty rates to a standardised penalty.
27. The Clerks Award clarifies when a Day Worker may be engaged on Saturday and Sunday and what penalty rates apply.
- a. Clause 13.3 provides that ordinary hours can be worked between (a) 7.00 am and 7.00 pm on Monday to Friday and (b) 7.00 am and 12.30 pm on Saturday,
  - b. Clause 13.5 permits ordinary hours to be set by reference to alternative awards and
  - c. Clause 24 provides a penalty rate of 125% for Saturday before 12.30 pm and 200% for Sunday engagements.
28. His Honour noted the incongruity between the penalty rates for the weekend for shift workers and day workers. We say that this apparent incongruity is resolved by reference to clause 13.5.
29. Clause 13.5 of the Clerks Award provides:

#### ***13.5 Setting ordinary hours by a different award***

***(a) Clause 13.5 applies if each of the following applies:***

***(i) one or more employees covered by this award work in association with other employees who are covered by a different modern award; and***

***(ii) that different modern award sets a spread of hours other than that set out in clause 13.3; and***

***(iii) those other employees work ordinary hours outside the spread of hours set out in clause 13.3.***

***(b) The employer may direct the employees mentioned in clause 13.5(a)(i) who are covered by this award to perform work within the spread of ordinary hours prescribed by the modern award that covers the majority of employees at the workplace.***

***EXAMPLE: An employee covered by this award works in association with***

*employees who are covered by an award that sets ordinary hours of work between 5.30 am and 6.30 pm Monday to Friday. The award that sets ordinary hours of work between 5.30 am and 6.30 pm Monday to Friday covers the majority of employees at the workplace. The employer may direct the employee covered by this award to work ordinary hours between 5.30 am and 6.30 pm Monday to Friday (rather than the spread set out in clause 13.3).*

30. Clause 13.5 of the Clerks Award permits ordinary hours to be set by awards covering other industries that may operate on Saturdays and Sundays, e.g. Manufacturing and the *Manufacturing and Associated Industries and Occupations Award 2020* (**'Manufacturing Award'**).
31. Once clause 13.5 is taken into account, the incongruity is resolved. The Clerks Award provides for a scheme of day work performed within business hours on weekdays and on Saturday mornings. This arrangement can be changed where the award provides occupational coverage of clerks in other industries. In that case, there is an additional penalty rate for ordinary hours worked on Sundays in recognition that this is unusual for most office day workers. The Clerks Award also provides for shift work, where ordinary hours can be worked at any time of day on any day of the week.
32. If there is an incongruity in the Clerks Award, it is the extension of day work to Saturday mornings.

#### Aligning Clerks Award roster patterns with other industries

33. No variation is necessary to permit ordinary hours to be worked on Saturdays or Sundays in the manufacturing industry.
34. Clause 17.2(c) of the Manufacturing Award states that ordinary hours can be scheduled on weekends, subject to agreement between the employer and employees. No variation is necessary to permit the manufacturing industry to roster employees on ordinary hours on Saturdays and Sundays.
35. Where cl. 13.5 of the Clerks Award operates, cl. 24 would then apply to determine penalty rate purposes.

#### ***Clause 42 Penalty rates (employees other than shiftworkers)***

*24.1 Clause 24 sets out higher rates of pay (penalty rates) for ordinary hours worked at specified times and on specified days.*

*NOTE: Clause 21—Overtime (employees other than shiftworkers) prescribes overtime rates for hours worked in excess of, or outside, ordinary hours.*

#### ***24.2 Saturday***

*An employer must pay an employee at the rate of 125% of the minimum hourly rate*

*for ordinary hours worked on a Saturday.*

**24.3 Sunday**

*(a) Clause 24.3 applies if under clause 13.5(b) an employee is directed to work ordinary hours on a Sunday.*

*(b) The employer must pay the employee at the rate of 200% of the minimum hourly rate for ordinary hours worked on a Sunday.*

*(c) An employee required to work ordinary hours on a Sunday is entitled to not less than 4 hours' pay.*

*Personal/ Carer's Leave and Compassionate Leave*

25 His Honour invited the ASU to provide our views on whether clauses 33.2 to 33.5 of the Clerks Award are necessary, given the effect replicates NES provisions.

26 We have considered the deletion of clauses 33.2 to 33.5 of the Clerks Award and agree that it is not necessary.

*Remote Work/ Working From Home*

27 During the consultation on 13 March 2024, his Honour invited the ASU to provide our views on a test case for Remote Work/ Working from Home.

28 In the Work and Care Topic of this Review, the ASU has made a proposal for a right to request to work from home. This is a high-level submission addressing a matter of principle. We believe that the Commission would need to consider the circumstances of the relevant industry before varying any modern award.

29 As a matter of principle, we believe that the current modern award working time protections remain relevant in the context of working from home. We do not believe that there is a need to substantially vary modern award provisions to provide for working-from-home arrangements.

30 We also believe that most of the flexibilities identified by employers can be achieved through existing arrangements. For example, employees can request flexible working arrangements under section 65 of the Fair Work Act that include working-from-home arrangements and roster flexibilities. These existing arrangements allow employees flexibility without ceding undue power to employers to set their working arrangements.

31 If the Commission is minded to initiate a test case on its own motion, we ask that the current Review and applications on foot be considered when determining the timeframe for the test case.

**AUSTRALIAN SERVICES UNION**

**27 March 2024**