



Modern Awards Review 2023-24 (AM2023/21)

Submission cover sheet

Name

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Organisation

Victorian Automotive Chamber of Commerce, the Motor Traders' Association of NSW, the Motor Trade Association of South Australia and Northern Territory, the Motor Trades Association of Queensland, and the Motor Trade Association of Western Australia, (collectively, the **Motor Trades Organisations**)

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Modern Award Review Stream:

Arts and Culture:

Job Security:

Work and Care:

Usability of awards:



Motor Trades Organisations

IN THE FAIR WORK COMMISSION

Modern Awards Review 2023-24 – Work and Care Discussion Paper (AM2023/21)

SUBMISSION ON BEHALF OF THE MOTOR TRADES ORGANISATIONS

1. This submission is filed on behalf of the Victorian Automotive Chamber of Commerce, the Motor Traders' Association of NSW, the Motor Trade Association of South Australia and Northern Territory, the Motor Trades Association of Queensland, and the Motor Trade Association of Western Australia, (collectively, the Motor Trades Organisations) with reference to the Work and Care Discussion Paper published by the Fair Work Commission on 29 January 2024 (**'Discussion Paper'**).
2. The Motor Trades Organisations (**'MTO'**) maintain an interest in the *Vehicle Repair, Services and Retail Award 2020* (**'Vehicle Award'**).
3. MTO welcomes the opportunity to make submissions in relation to the work and care stream of the Modern Awards Review 2023-24 (**'Review'**) conducted by the Fair Work Commission (**'Commission'**) in respect to the Vehicle Award.

Overview

4. The object of this stream of the Review is to consider the *"impact of workplace relations settings on work and care, including early childhood education and care, having regard to relevant finding and recommendations of the Final Report of the Senate Select Committee on Work and Care"*.¹
5. MTO notes that the Statement issued by the Commission on 29 January 2024, makes clear that the review is being conducted pursuant to sections 157 and 576(2)(aa) of the *Fair Work Act 2009* (**'FW Act'**) – which respectively deal with the Commission's power to vary modern awards if

¹ President's Statement, Modern Awards Review 2023-24, 15 September 2023, [3].

necessary to achieve the modern awards objective and its function of promoting cooperative and productive workplace relations and preventing disputes.

6. MTO submits that in the context of the review, the Commission should have particular regard to the following modern award objectives:
 - *“the need to promote flexible modern award practices and the efficient and productive performance of work”*²; and
 - *“the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden”*³
7. MTO further notes that the function of promoting cooperative and productive workplace relations is reflective of the objective of the *FW Act*, which seeks to achieve this aim as a balanced framework achieved through a range of measures, that relevantly include:
 - the provision of workplace relations laws that *“... are flexible for businesses, promote productivity and economic growth...”*⁴;
 - that assist employees *“... to balance their work and family responsibilities by providing for flexible working arrangements”*⁵; and
 - that acknowledge *“... the special circumstances of small and medium-sized businesses.”*⁶

Final Report of the Senate Select Committee on Work and Care

8. As noted at Chapter 2 of the Discussion Paper, the Senate Select Committee on Work and Care Final Report (**‘Inquiry Report’**) identifies several recommendations that are within the scope of the current Review. However, MTO submits that caution should be applied in considering these recommendations. For example, MTO is concerned by both the politically partisan nature of the Inquiry Report, evidenced by the additional commentary provided by the Coalition Senators; as well as the Inquiry Report’s evidentiary focus on large, enterprise agreement covered businesses, in contrast to the small businesses who make up the vast majority of businesses covered by modern awards.
9. MTO is further concerned that a key premise underpinning the (majority) recommendations of the Inquiry Report is that *“Australians now have a right—indeed, an obligation—to work, but they do not have a right to both work and care...”*⁷. MTO submits that such an assertion fundamentally misrepresents this right, which is more accurately expressed as an opportunity to make a living by work that is freely chosen or accepted.⁸ Likewise, the Inquiry Report’s associated ‘social contract’

² *Fair Work Act 2009* (Cth), s 134(1)(d).

³ *Ibid* s 134(1)(f).

⁴ *Ibid* s 3(a).

⁵ *Ibid* s 3(d).

⁶ *Ibid* s 3(g).

⁷ Senate Select Committee on Work and Care, Final Report (March 2023), xxiv (‘Inquiry Report’).

⁸ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 6.

theory approach is similarly problematic, both in terms of its application and in its failure to consider the needs of employers.

10. MTO submits that the most appropriate approach to addressing the issue of work and care, particularly in the context of a modern awards review, is found in the following commentary provided as part of the Inquiry Report:

“1.3 The Australian labour market is diverse and provides various forms of work for people in different circumstances or with different needs. As policymakers we note that the best way to encourage Australians into work is to support all forms of work, as this gives Australian jobseekers the ability to find positions, arrangements and levels of work that fit around their needs...”

1.4 Many recommendations of this report will see further deterioration of the flexibility and consideration of what employers and employees are looking for when it comes to fulfilling work, and a move to further regimented and legalistic nature of the workplace relations system. Such change will be detrimental to all Australians.

1.5 ... the employer/employee relationship is better when approached from a position of flexibility and common sense, and both the needs of the employer and employee are taken into consideration –not by a ‘one-size-fits-all’ approach...”⁹

11. MTO agrees that the best work and care outcomes are achieved for both employers and employees through mutual agreement, facilitated through flexibility and common sense, underpinned by the statutory safeguard provided by Division 4 of the NES. MTO therefore submits that the focus of this stream of the Review should be on ensuring that provisions of modern awards do not serve to prevent such agreements from being reached, rather than on seeking to find ‘one-size-fits-all’ solutions that ultimately make the making of such agreements more difficult.

Discussion Paper questions

Flexibilities (Question 2, 3, 16):

- 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?
- 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?
- Are there any specific variations for more flexible working arrangements (as an alternative to extended unpaid carer’s leave) in modern awards that are necessary to ensure they continue to meet the modern awards objective?

⁹ Inquiry Report (n 7) 201.

12. As outlined above, MTO believes that the best outcomes are achieved for both employers and employees through mutual agreement, facilitated through flexibility and common-sense. Accordingly, it is important that modern awards are facilitative of such outcomes. MTO submits that in practice, modern award facilitative provisions, are currently the most effective mechanism enabling this necessary flexibility to be achieved.
13. Whilst MTO does not suggest that any specific variation to the facilitative provision at clause 7 of the Vehicle Award is necessary to ensure it continues to meet the modern awards objective, MTO does suggest that any such consideration should look at firstly, whether all facilitative provisions should be able to be utilised by agreement between employer and individual employee (rather than in some instances, requiring majority agreement); and secondly, whether the current list should be expanded to facilitate additional flexible working arrangements, such as enabling employees to take annual leave at half pay (see response to Question 13 below).
14. MTO notes that the practical importance of modern award facilitative provisions are, in part, the result of the inherent complexity, uncertainty and administrative burden associated with individual flexibility arrangement (IFA) provisions in modern awards. MTO submits that these concerns, particularly in relation to small businesses, have resulted in IFAs being rarely used. MTO notes that this is reflected in the General Manager of the FWC's most recent report into the use of IFAs pursuant to section 653 of the *FW Act*, which found the approximately 65% of all respondents had been involved in the making of (or responding to) 10 or fewer IFAs between 2018 and 2021.¹⁰
15. MTO notes that the Australian Chamber of Commerce and Industry (ACCI) submission to the *Modern Award 2023-24: Making Awards Easier to Use* stream¹¹ proposed changes to the IFA clauses in each of the common modern awards. MTO is supportive of those changes in the context of making modern awards easier to use, but is ultimately concerned that the solution may require statutory change.

Rostering/ Hours of Work (Question 7, 8, 9, 10):

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

¹⁰ Murray Furlong, *General Manager's report into individual flexibility arrangements under section 653 of the Fair Work Act 2009 (2018-2021)* (Report, November 2021), 10.

¹¹ ACCI Submission – Modern Award Review 2023-24 – Making Awards Easier to Use, (22 December 2023), Proposal F, 36-41.

16. MTO does not suggest any variations are necessary to the relevant provisions of the Vehicle Award to ensure it continues to meet the modern awards objective. However, MTO would make the following observations in relation to the Discussion Paper commentary on the Vehicle Award provided in relation to the above questions, that note that the Vehicle Award:
- does not include a minimum payment period for part-time employees¹²
 - does not specify a span of hours¹³
 - does not appear to include provisions requiring an employer to give notice of rosters, notice of changes to roster, or notice of changes to ADOs/RDOs¹⁴
17. In regard to the minimum payment period for part-time employees, clause 10 of the Vehicle Award provides that at the time of engagement, the employer and part-time employee will agree in writing, amongst other things, the hours worked each day¹⁵– and that any subsequent variation to that agreement must be agreed in writing (including by electronic means).¹⁶ MTO submits that the prescribing of minimum payment periods for part-time employees is not appropriate in circumstances where the minimum number of ordinary hours worked on any day must be agreed in writing between employer and employee.
18. In regard to span of hours, MTO notes that, in addition to the applicability of penalty rates for work performed at particular times noted in the Discussion Paper, clause 22.2 of the Vehicle Award provides that ordinary hours for full-time and part-time employees will be worked on not more than 5 days in any week. The only exception is where an employer accepts a part time employee’s written request to be employed on more than 5 days per week, pursuant to clause 10.8 of the Vehicle Award. In addition, MTO notes that in relation to averaging hours of work, in addition to the options noted in the Discussion Paper (i.e. 22.2(a) – (d))¹⁷, the Vehicle Award include a facilitative arrangement enabling any other cycle during which a weekly average of 38 hours (pro-rata for part-time) is worked, to be determined by agreement between the employer and an employee or employees.
19. In regard to the question of notice, MTO notes that consistent with all modern awards, clause 36 of the Vehicle Award requires an employer to consult with affected employees (and consider any views given) prior to implementing a proposed change to the regular roster of an employee. MTO submits that this provision enables a flexible and common-sense approach to consultation/notification that avoids the imposition of arbitrarily restrictive ‘one-size-fits-all’ approaches, such as the one provided at Recommendation 21 of the Inquiry Report. MTO notes that whilst a minimum 2 weeks’ notice period (other than in exceptional circumstances) may be suitable for some larger businesses in some industries, it is antithetical to the flexibility required by small businesses (in particular) and is therefore inappropriate to form part of the modern award safety net for industries such as automotive.

¹² Fair Work Commission, Discussion Paper – Work and Care (January 2024), [162].

¹³ Ibid [169].

¹⁴ Ibid [178].

¹⁵ Vehicle Award cl 10.3(a)

¹⁶ Ibid cl 10.4.

¹⁷ Discussion Paper [172].

20. For completeness, whilst MTO does not suggest any specific variation to clause 24.6 of the Vehicle Award is necessary to ensure it continues to meet the modern awards objective, it is noted that the TOIL provision is paid time equivalent to the overtime payment (rather than simply the equivalent amount of time off). MTO notes that this may act as a disincentive to employers agreeing to an employee TOIL request, which may adversely impact flexible working arrangements. MTO however notes that this risk is mitigated, at least in part, by other facilitative arrangements (such as make-up time) provided in the Vehicle Award.

Working From Home/ Out of Hours (Question 4, 5, 11, 12):

- 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?
- 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?
- 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?
- 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?

21. MTO does not suggest any variations are necessary to the relevant provisions of the Vehicle Award to ensure it continues to meet the modern awards objective.

22. In respect to working from home, MTO believes that the location at which work is to be performed by an employee should remain a matter to be determined by the employer, following consultation with the employee where appropriate in accordance with statutory requirements (e.g. Division 4 of the NES).

23. MTO notes that working from home is often not practicable for small businesses to accommodate. This is particularly the case in industries, such as automotive, where the inherent requirements of the work performed will typically require a physical, rather than virtual, presence in the workplace (e.g. vehicle spray painter). As members of the MTO experienced during the extraordinary circumstances of the COVID-19 pandemic, very few roles in the vehicle repair, services and retail industry covered by the Vehicle Award were able to operate from home – let alone do so productively. On the question of productivity of working from home raised in the Discussion Paper¹⁸, MTO notes that the Productivity Commission found that “... *the impact on productivity of working from home for an individual worker is ambiguous.*”¹⁹

¹⁸ Ibid [134].

¹⁹ Productivity Commission, Working from home, (September 2021), 34.

24. More broadly, MTO cautions against placing too great a reliance on research data and/or working arrangements that occurred as a result of the COVID-19 pandemic. MTO notes for example, that the Vehicle Award, like other modern awards, contained a specific Schedule that was “... aimed at preserving the ongoing viability of businesses and preserving jobs during the COVID-19 pandemic and not to set any precedent in relation to award entitlements after its expiry date.”²⁰ Further, and as noted in the Discussion Paper²¹, interested parties had the opportunity to further vary the *Clerks – Private Sector Award 2020* (**‘Clerks Award’**) Schedule to facilitate agreed working from home arrangements and ultimately chose not to do so. This is not to say however, that there is no merit in considering a facilitative provision to enable such flexibility in the Clerks Award.
25. In respect to right to disconnect, MTO notes the President’s Statement on 27 February 2024, following the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* receiving Royal Assent on 26 February 2024, and understands that this is no longer a matter for consideration as part of the work and care stream consultation process.
26. MTO does however submit that the current standing by, call-back (general), call-back (breakdowns etc.) and travelling time provisions of the Vehicle Award are consistent with the modern awards objective and do not require variation. In particular, MTO notes the provision relating to call-back (breakdowns etc.) under the Vehicle Award includes a specific facilitative arrangement through mutual agreement between an employer and individual employees.

Leave Related (Question 13, 14, 15, 17, 18):

- 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?
 - Are there any specific variations to expand the definition of immediate family in modern awards that are necessary to ensure they continue to meet the modern awards objective?
 - Are there any specific variations to personal/carer’s leave provisions (e.g. separating personal/carer’s leave) in modern awards that are necessary to ensure they continue to meet the modern awards objective?
 - 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?
27. MTO does not suggest any variations are necessary to the leave-related provisions of the Vehicle Award to ensure it continues to meet the modern awards objective.
28. MTO notes that the Productivity Commission Inquiry Report examined the economic and social costs and benefits of providing an extended unpaid leave entitlement to informal carers of older

²⁰ Vehicle Award, Schedule I – Award flexibility during the COVID-19 Pandemic, [l.1.1].

²¹ Discussion Paper [137]-[141].

people in the National Employment Standards (NES), did not find a strong case for amending the NES.²² Rather, the Productivity Commission relevantly found that:

“Flexible working arrangements, agreed between working carers and their employers, can be a better solution for both working carers and for employers.”²³

29. Accordingly, to the extent to which leave-related entitlements are to be considered, MTO submits that they must be in the form of a facilitative arrangement, made by written agreement between the employer and the individual employee.

30. Of the options canvassed in the Discussion Paper, annual leave at half pay would appear to be the most appropriate as a facilitative arrangement. MTO notes that a facilitative provision in the following terms was included in Schedule I of the Vehicle Award during the COVID-19 pandemic:

“Employers and individual employees may agree to take up to twice as much annual leave at a proportionately reduced rate for all or part of any agreed or directed period away from work, including any close-down.”²⁴

31. As discussed above however, MTO reiterates its concerns relating to the continuing relevance of COVID-19 pandemic provisions in the context of the current review – and its position that a variation in such terms is, in any event, not necessary to ensure the Vehicle Award continues to meet the modern awards objective.

Conclusion

32. In summary, MTO does not believe any specific variations to the Vehicle Award are necessary, as part of the current review, to ensure that it continues to meet the modern awards objective.

MOTOR TRADES ORGANISATIONS

12 March 2024

²² Productivity Commission, A case for an extended unpaid carer leave entitlement? Inquiry Report (2023), 1.

²³ Ibid 4.

²⁴ Vehicle Award [I.3.4].