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Sent: Friday, December 22, 2023 12:22 PM
To: Awards <Awards@fwc.gov.au>
Cc: Victor Song <Victor.Song@ablawyers.com.au>
Subject: AM 2023/21 - Submission and Application

Dear Sir/Madam

Our firm acts for Business NSW and Australian Business Industrial.

I refer to the President's Statement in these proceedings dated 4 October 2023. **Attached** is a submission in response to the request for proposals regarding making awards easier to use. The submissions contain separate schedules containing draft determinations giving effect to each proposal advanced by our clients.

Whilst our clients propose 5 categories of changes, for the abundance of caution and for the reasons outlined in paragraphs 5.19 to 5.28 of the attached submissions, one category of proposed change (an exemption rate for certain classes of workers engaged on salaries 55% above the minimum weekly rate of the Clerks – Private Sector Award) is accompanied by the **attached** application filed by our clients under s157 of the FW Act.

A copy of the s157 application has been attached to this email for the purposes of filing.

Should you have any queries, please do not hesitate to contact me.

Yours faithfully

Luis Izzo
Managing Director - Sydney Workplace
Australian Business Lawyers & Advisors



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:

INTRODUCTION

Business NSW (**BNSW**) is New South Wales' peak business organisation with nearly 100,000 business members in NSW and Australia, spanning all industry sectors and sizes. Operating across **metropolitan and regional NSW, we field senior local leadership and teams throughout the state**, representing the needs of business to all levels of government.

For nearly 200 years Business NSW (formerly the NSW Business Chamber) has been advocating to create a better NSW and Australia by representing the needs of businesses to create the economic conditions that allow our members to grow and drive NSW and the nation forward. Our experience has proven that planning and delivering with Government increases prosperity, creates new jobs, and builds better communities for everyone.

We work closely with our members, partners, stakeholders, local, state and federal government to advocate for practical policy solutions to ensure Australian businesses of all sizes can prosper.

Australia Business Industrial (**ABI**) is the industrial relations affiliate of BNSW. ABI is federally registered under the *Fair Work (Registered Organisations) Act 2009* and engages in policy advocacy on behalf of its membership as well as engaging in industrial advocacy in State and Federal tribunals.

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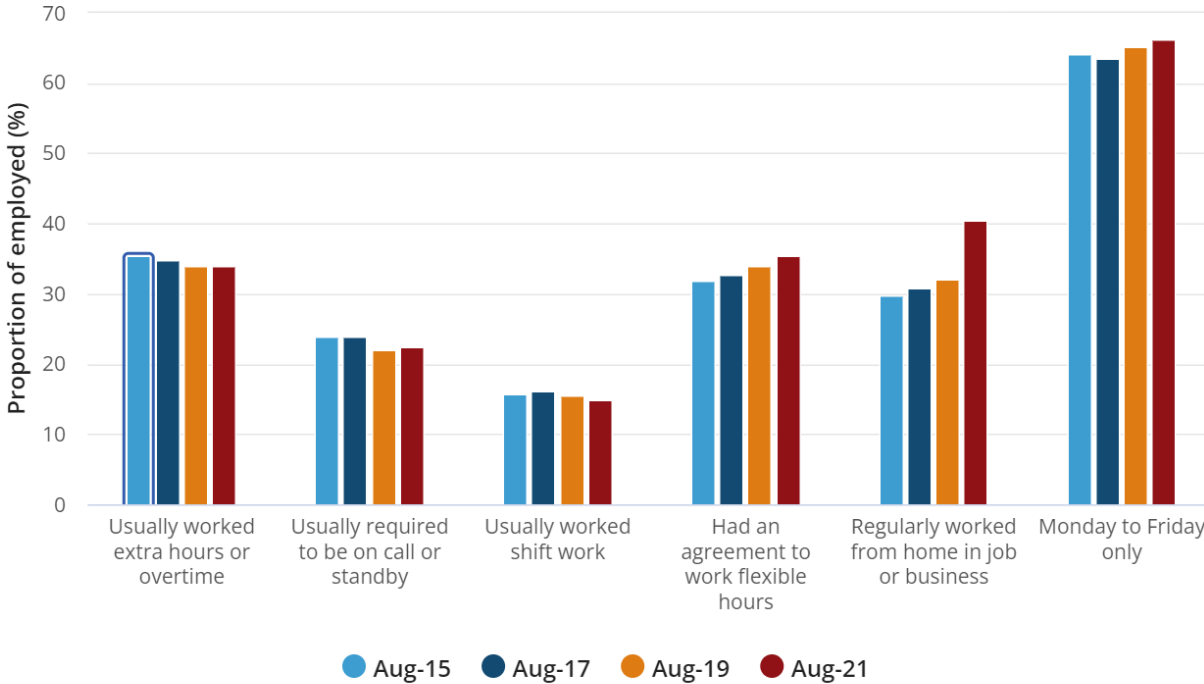
SUBMISSIONS ON BEHALF OF BUSINESS NSW AND AUSTRALIAN BUSINESS INDUSTRIAL

1. INTRODUCTION

- 1.1 In a Statement dated 4 October 2023, the President of the Commission requested that interested parties file proposals and draft determinations in support of any award variations that would make awards easier to use with respect to 7 commonly used awards, namely:
- (a) the *General Retail Industry Award 2020* (**GRIA**);
 - (b) the *Social, Community, Home Care and Disability Services 2010* (**SCHADS Award**);
 - (c) the *Hospitality Industry (General) Award 2020* (**HIGA**);
 - (d) the *Fast Food Industry Award 2020*;
 - (e) the *Restaurant Industry Award 2020* (**Restaurant Award**);
 - (f) the *Children's Services Award 2010* (**Children's Award**); and
 - (g) the *Clerks Private Sector Award 2020* (**Clerks Award**).
- 1.2 These submissions identify 5 categories of variations to modern awards that are proposed by Business NSW (**BNSW**) and Australian Business Industrial (**ABI**) and provide an outline of the grounds BNSW and ABI rely upon in proposing the variations.
- 1.3 Each category of variation proposed is accompanied by a draft determination or multiple draft determinations where more than one award is affected. The determinations for each category of change appear in separate Schedules to these submissions.
- 1.4 In one case (a proposed exemption rate for clerical employees), the determination is accompanied by an application filed on behalf of BNSW and ABI under s158 of the *Fair Work Act 2009* (**FW Act**). This change is being proposed by way of application out of an abundance of caution for the reasons outlined in section 5 below.

2. CATEGORY 1 - WORKING HOURS CONTINUOUSLY

- 2.1 The Clerks Award and the Children’s Award both require employees to work their ordinary hours continuously (ie. in “*unbroken periods*”).
- 2.2 This carries some benefit to employees because it avoids the inconvenience of having to travel to the workplace to perform work and being required to then re-attend the workplace later in the same day.
- 2.3 The clause has been in both the Clerks Award and the Children’s Award since its commencement in 2010.
- 2.4 However, particularly since the onset of the COVID-19 pandemic, circumstances are arising more commonly where employees might seek to work their hours more flexibly to suit their own needs (including individual caring responsibilities).
- 2.5 For instance, it is the experience of ABI/BNSW members that requests for employees to cease work at particular parts of the normal working day to then recommence work later (whether at the workplace or at home) are more common now than has historically been the case.
- 2.6 This member experience is also born out by ABS data released on 14 December 2022, which demonstrates a growing trend in persons seeking “*flexible working hours*” or persons working from home:¹



¹ ABS, *Working arrangements*, August 2022

- 2.7 In order to facilitate these types of working arrangements, where they are suitable to both the employer and employee, ABI/BNSW submit that the parties should be able to work employment hours in a pattern that best suits them, provided that the arrangement is voluntary.
- 2.8 According, BNSW and ABI seek to vary clauses 13.6(a) and clause 21.2 of the Clerks Award and Children's Award respectively so that employees may choose to work their ordinary hours non-continuously should they wish to do so.
- 2.9 Draft determinations giving effect to this change are annexed at **Schedule 1**.

3. CATEGORY 2 - VARIATION TO PART-TIME WORKING HOURS

- 3.1 The Clerks, SCHDS and the Children's Awards provide that the regular pattern of working hours for part-time employees can be varied if agreed in writing between the parties.
- 3.2 The relevant clauses for each award are:
- (a) clause 10.3 of the Clerks Award;
 - (b) clause 10.3(e) of the SCHDS Award;
 - (c) clause 10.4(d)(i) of the Children's Award.
- 3.3 The ability to change the regular pattern of hours of work is unqualified, which indicates that the changes can be temporary or ongoing, depending upon what has been agreed upon by the parties. Moreover, as there is no restriction in the relevant clauses regarding when any agreement to change hours of work must be made, provided the change is agreed *before the hours are worked*, the change is a valid and effective variation to the agreed pattern of work.
- 3.4 The type of arrangement outlined in these 3 Awards reflects the arrangements that existed in the GRIA prior to a variation made to the GRIA in 2021. Specifically, the GRIA used to provide as follows:
- "The employer and the employee may agree to vary the regular pattern of work agreed under clause 10.5 with effect from a future date or time. Any such agreement must be in writing."*²
- 3.5 In *Award Flexibility - General Retail Industry 2020* [2021] FWCFB 1608, a Full Bench of the Fair Work Commission considered this type of provision and expert evidence

² The relevant provision is extracted at *Award Flexibility - General Retail Industry 2020* [2021] FWCFB 1608 at [107]

filed by ABI/BNSW in relation to how the GRIA had been applied by employers in the industry.

- 3.6 The Full Bench found that the drafting of clause 10.6 of the GRIA (as it then was) had caused a level of confusion among retail employers regarding whether ordinary hours of work could be varied by agreement, so that employees could work additional or different hours without attracting overtime payments.³
- 3.7 In a further decision, *Award Flexibility - General Retail Industry Award 2020* [2021] FWCFB 3571, the Full Bench further reinforced that there was existing confusion regarding how variations to hours of work could be made under clause 10.6 of the GRIA and whether such variations attracted overtime entitlements.
- 3.8 The Full Bench ultimately varied the GRIA to reflect its intended operation⁴—by inserting a new provision as follows:

“10.6 Changes to regular pattern of work by agreement

The employer and the employee may agree to vary the regular pattern of work agreed under clause 10.5 on a temporary or ongoing basis, with effect from a future date or time. Any such agreement must be recorded in writing:

(a) if the agreement is to vary the employee’s regular pattern of work for a particular rostered shift – before the end of the affected shift; and

(b) otherwise – before the variation takes effect.

NOTE 1: An agreement under clause 10.6 could be recorded in writing including through an exchange of emails, text messages or by other electronic means.

NOTE 2: An agreement under clause 10.6 cannot result in the employee working 38 or more ordinary hours per week.”

- 3.9 The variation has provided a greater level of certainty that ordinary part-time working hours can be varied by agreement either formally or informally (ie. through electronic means) provided the variation is in writing and provided it takes place before the varied hours are in fact worked.

BNSW and ABI proposal

- 3.10 BNSW and ABI propose that the Commission vary the Clerks Award, SCHDS Award and Children’s Award to contain terms closely aligned to the GRIA part time clause

³ At [107]

⁴ This is confirmed in *Award Flexibility - General Retail Industry Award 2020* [2021] FWCFB 3571 at [76]

with respect to changes to hours of work so that the existing drafting of these 3 Awards can be better understood.

- 3.11 Each of these Awards contain provisions that aligned to the GRIA's previous drafting. By redrafting these Awards in line with the amendments made to the GRIA in 2021, the Commission will ensure that the Awards' intended operation can be more effectively communicated and more properly understood.
- 3.12 Draft determinations giving effect to these changes are annexed at **Schedule 2**.

4. CATEGORY 3 - CLASSIFICATION OF EMPLOYEES

- 4.1 The classification structures contained in a number of the commonly used awards naturally differ by reference to the different work that is required to be performed in each industry.
- 4.2 However, the way in which classifications are analysed and applied to individual employees is historically undertaken by a relatively consistent approach.
- 4.3 The Courts have regularly applied a "*principal purpose*" test to ensure a consistent approach is adopted to classifying employees.⁵
- 4.4 In the case of the Clerk's Award, the principal purpose test is facilitated (and parties are assisted in the classification exercise) by the addition of some further guidance principles. Specifically, clause 12.2 of the Clerks Award provides as follows:

The classification by the employer must be based on the characteristics that the employer requires the employee to have, and skills that the employer requires the employee to exercise, in order to carry out the principal functions of employment.

- 4.5 By including this guidance in the Clerks Award, two outcomes are achieved:
 - (a) First, the employers and employees are provided practical guidance as to how to classify employees.
 - (b) Secondly, the Award confirms that the primary determinants of an employee's classification relate to the *purpose* of the engagement (consistent with the abovementioned authorities). That is, the Award directs guidance to the activities and skills required in the role as opposed to skills an employee might possess which are not relevant to the role.

⁵ *Carpenter v Corona Manufacturing Pty Ltd* (2002) 122 IR 387; *Brand v APIR Systems Ltd* [2003] AIRC 1161; *Halasagi v George Weston Foods Limited* [2010] FWA 6503; *McMenemy v Thomas Duryea Consulting Pty Ltd T/A Thomas Duryea Consulting* [2012] FWAFB 7184; *Paul Bateman v Communications Design & Management Pty Limited* [2014] FWCFB 8768 at [22]- [23].

4.6 Whilst ABI and BNSW are supportive of this guidance contained in the Clerks Award, other awards do not adopt such user-friendly guidance.

4.7 An example of this are clauses 14 of the Restaurant Award and the HIGA, which both provide:

“An employer must classify an employee covered by this award in accordance with Schedule A - Classification Structure and Definitions”

4.8 Similarly, clause 13 of the Children’s Award contains a provision as follows:

“The definitions of the classification levels in clause 14 — Minimum wages are contained in Schedule B—Classification Structure.”

4.9 Finally, the SCHDS Award provides as follows at clause 13.1:

“The definitions for the classification levels in clauses 15 to 17 are contained in Schedule B to Schedule E”.

4.10 The above clauses provide little practical guidance when classifying employees and leave greater scope for confusion regarding the status of any qualifications an employee might hold which are not relevant to the employee’s role.

4.11 This is the type of issue that was exposed in *United Voice v Pet Porpoise Pool Ltd* (Unreported Local Court Decision 10 July 2013 - **attached** to these submissions), where an employee who possessed certain qualifications (in that case, a university degree) that the employer did not require in the performance of the role was nevertheless then entitled to a higher grade of payment merely on account of her possession of these higher qualifications - regardless of their relevance to the role.⁶

Proposal

4.12 ABI and BNSW propose that the Commission vary each of the below provisions of the following modern awards by introducing a clause that aligns to the current clause 12.2 of the Clerks Award:

- (a) HIGA - clause 14;
- (b) Restaurant Award - clause 14;
- (c) SCHDS Award - clauses 13.1 to 13.3; and
- (d) Children’s Award - clause 13.1

⁶ See [24] - [28] of the Judgment

4.13 Specifically, it is proposed that the following content is inserted into each of the above awards:

“The classification by the employer must be based on the characteristics that the employer requires the employee to have, and skills that the employer requires the employee to exercise, in order to carry out the principal functions of employment.”

4.14 Draft determinations giving effect to these changes are annexed at **Schedule 3**.

5. CATEGORY 4 - EXEMPTION RATE FOR CLERICAL EMPLOYEES

5.1 The Clerks Award has the highest coverage of employment in Australia, with many of the functions of the Award covered under the occupation of “*Clerical and Administrative Worker*” for the purposes of the Australian Bureau of Statistics’ monthly Labourforce Survey.⁷

5.2 As at August 2023, 1,827,000 employees were engaged in clerical and administrative work in Australia⁸, representing about 12.5% of all employees.⁹

5.3 Approximately 50% of these clerical workers are engaged on more generous individual arrangements that are underpinned by the Clerks Award.¹⁰

5.4 Indeed, ABS data identifies that approximately 28% of employees engaged as clerical and administrative workers in Australia earn 150% or more per hour than the Award hourly wage for a Grade 5 Clerks Award employee.¹¹

5.5 Notwithstanding the substantial number of employees engaged on over-award salaries across the economy, employers of these employees are required to observe a complex range of individual monetary based entitlements (including allowances and loadings) even where their employee is in no danger of ever earning below the Clerks Award safety net.

5.6 That is, even where the pay regime under the Award has been largely superseded, employers are expected to have a sound understanding of each award monetary entitlement, to keep records based on when such entitlements become payable and to ensure the entitlement is separately being applied, even where the employee is in very little danger of being underpaid against the Award.

⁷ *Application by Australian Chamber of Commerce and Industry & The Australian Industry Group* [2020] FWCFB 1690 at [16]

⁸ Australian Bureau of Statistics, *Labourforce*, Cat 6291, August 2023

⁹ Australian Bureau of Statistics, *Labourforce*, Cat 6202, August 2023

¹⁰ *Application by Australian Chamber of Commerce and Industry & The Australian Industry Group* [2020] FWCFB 1690 at [16]

¹¹ Australian Bureau of Statistics, *Employee Earnings*, Cat 6337, August 2022

5.7 This concern is particularly acute when it comes to clerical and administrative workers because:

- (a) Firstly, the sheer number of 'middle managerial' positions that can be covered by the Clerk's Award's occupational coverage means there are broad range of employers of all types and sizes and all different levels of industrial sophistication being subject to the Clerks Award's provisions.
- (b) Secondly, for many employers, the Clerks Award will not be their 'primary' award. Rather their workforce might mainly be covered by an industry award, with a small handful of employees falling under the Clerks Award. This results in scenarios where the employers may not have as sound an understanding of their obligations with respect to clerical employees as compared to the major portion of their workforce.

A solution to the complexity

5.8 For those employers paying well above the Clerk's Award's monetary rates, a clear and simple solution could remove much of the regulatory burden associated with Award coverage, without reducing employee entitlements or excluding employees from important non-monetary Award entitlements pertaining to matters such as flexibility requests, consultation, dispute resolution and unpaid breaks.

5.9 The solution lies in a well targeted, fair and balanced exemption rate that can be applied to higher income earners covered by the Award's higher grades (Grades 3-5).

5.10 Indeed, an exemption rate has historically been an attractive mechanism utilised by industrial tribunals to identify a demarcation between 'subordinate' and managerial staff. In *Alcoa of Australia Ltd v Federated Clerks Union of Australia* [1990] AIRC 163, Munro J noted as follows:

"The notion of an exemption rate as the point of demarcation between a subordinate employee and a staff or managerial level employee seems most compatible with the evidence and history of the provision in the awards and their antecedents. Moreover, such an approach is also consistent with the rationale of some exemption clauses which have been the subject of arbitral discussion in this Commission. That rationale is consistent also with the exemption rate being treated as the practical boundary to FCU negotiations for overaward payments."

5.11 More recently, a Full Bench of the Fair Work Commission has accepted that:

“As a general proposition, exemption rates can “reduce award complexity and the regulatory burden on business and may encourage collective bargaining.”¹²

5.12 The Commission has also found that the previous constraints to including exemption rates in modern awards (by virtue of the Award Modernisation Request) no longer exist:¹³

[91] In our view, the constraints that the Minister’s Award Modernisation Request placed on the AIRC as to the terms it could include in modern awards do not apply to variations to modern awards under the Act. The Commission can include exemption rate clauses in modern awards provided that:

- *it is satisfied that they are necessary to achieve the modern awards objective in s.134 of the Act*
- *they are about matters set out in s.139 of the Act*
- *they are not terms that must not be included in a modern award, and*
- *they do not have the effect that employees earning above a certain rate stop being covered by the award altogether (unless the Commission is satisfied that those employees would instead be covered by another modern award (other than the Miscellaneous Award) that is appropriate for them).*

5.13 BNSW and ABI propose that an exemption rate be included in the Clerks Award, so that employers engaging higher earning employees can receive the administrative benefit of a simpler award system. This proposal would provide a simple framework establishing a sufficient monetary safety net for the employees so that they are not worse-off compared to other award-based workers.

5.14 The exemption rate incorporates payment for a total number of hours, before individual penalty rates are applied for all other hours of work. This has seven attractive features of note (amongst others):

- (a) Firstly, the arrangement is one which employees and employers have the right to ‘opt-into’. The arrangement is entirely voluntary.
- (b) Secondly, the arrangement ensures that a single time rate of pay can be applied up to a particular specified threshold. BNSW and ABI expect that many employees will never reach the nominated threshold.

¹² *Application by Restaurant and Catering Industrial* [2021] FWCFB 4149 at [92]

¹³ *Application by Restaurant and Catering Industrial* [2021] FWCFB 4149 at [91]

- (c) Thirdly, where employees work above the threshold, the proposal again applies a simple single rate of pay for all additional hours regardless of when they fall.
- (d) Fourthly, it provides the Commission with some comfort that the arrangement cannot be used to overwork employees on large volumes of hours that would ordinarily give rise to an underpayment. The thresholds built in address this concern.
- (e) Fifthly, the employees receive the benefit of the higher rate of pay for their personal leave, annual leave and superannuation payments, providing additional benefits that would not ordinarily apply to overtime payments. This is of significant benefit to employees.
- (f) Sixthly, it simplifies record keeping obligations for employers, ensuring employers only need to keep records of those hours worked above 50 per week, pursuant to Regulation 3.34 of the *Fair Work Regulations 2009*. Given the extraordinary new penalties that can be imposed on employers for a failure to accurately keep records - \$469,500 for companies and \$4,695,000 for serious contraventions by companies - this is of material importance to ensuring a fair, practical and sustainable safety net.
- (g) Finally, it provides an incentive for employees to accept employment because the employees can identify an attractive regular rate of pay which they know they will be guaranteed and can then rely upon for a variety of personal reasons, including obtaining finance approval (which can notoriously be difficult when an employee's notional or ordinary rate of pay does not match their expected overtime or variable payment components).

The specific proposal

- 5.15 The proposal involves employers agreeing to pay employees classified at **Levels 3, 4 or 5 of the Award** at a salary rate for a week's pay at **55%** above their existing weekly Award base rate of pay.
- 5.16 The payment would be sufficient to incorporate and offset:
 - (a) Sufficient remuneration to cover up to 50 hours work per week every week, including:
 - (i) 4 hours of overtime at 150%
 - (ii) 8 hours of overtime at 200%

- (b) A payment for leave loading.
 - (c) Individual allowance payments.
 - (d) Penalty rates.
- 5.17 The payment excludes public holiday work, which would need to be separately remunerated if an employee is required to work a public holiday.
- 5.18 Where employees work beyond 50 hours per week, the employee will be entitled to 200% of the ordinary hourly rate for their classification.

Proposal supported by application

- 5.19 BNSW and ABI intend to file calculations to demonstrate that, in aggregate, employees will be better off overall under the exemption rate proposal than if they were simply paid award rates for their relevant hours of work.
- 5.20 The simplicity associated with the proposal also substantially engages with subsections 134(1)(f) and s134(1)(g) of the FW Act and commends itself as a proposal that should be seriously considered by the Commission.
- 5.21 In all cases, it remains possible that a contradictor might be able to identify a theoretical/hypothetical category of person that might somehow possibly be disadvantaged by a proposal. In so doing, such a hypothetical scenario could have the effect of impeding what is otherwise a generally meritorious proposal that advances the objects of the modern awards objective and the FW Act generally.
- 5.22 With this in mind, BNSW and ABI are concerned by elements of the Minister's Request to the Fair Work Commission dated 12 September 2023 (**Ministerial Request**) that indicated that outcomes "*should not result in any reduction in worker entitlements*". These comments were echoed in the President's Statement dated 15 September 2023 at [10] (**15 September Statement**).
- 5.23 The possibility of a single worker's entitlements being reduced when:
- (a) the arrangement proposed is voluntary; and
 - (b) the benefits of an aggregate proposal are generally so meritorious, should not prevent the proposed variation from being granted.
- 5.24 Moreover, the FW Act itself imposes no similar hurdle to varying awards.
- 5.25 Indeed, by the operation of s138 of the FW Act, modern awards must be varied if the Commission forms the view that the variation is necessary to meet the modern

awards objective. The FW Act imposes no qualification on this obligation of the kind identified in the Ministerial Request or 15 September Statement.

- 5.26 With this in mind, and out of an abundance of caution, BNSW and ABI accompany this particular variation to the Clerks Award with a variation application under s157 of the FW Act to ensure that the regulatory framework applicable to variation applications can be applied.
- 5.27 BNSW and ABI are content for the Commission to consider this proposal together with other proposals as part of proceedings AM2023/21, subject to the views of the Commission.
- 5.28 A copy of the proposed draft determinations giving effect to these changes are annexed at **Schedule 4**, and the application has been separately filed with these submissions.

6. CATEGORY 5 - ANNUAL LEAVE

- 6.1 The Australian Chamber of Commerce and Industry has proposed the introduction of new clauses into the 7 Awards subject of these proceedings pertaining to excessive annual leave accruals.
- 6.2 The new clauses propose to permit an employer to direct the taking of annual leave in the following circumstances:

X.X Excessive leave accruals

Despite anything else in this clause, an employer may direct an employee to take a period of paid annual leave if:

- (a) the employee has accrued at least 8 weeks of annual leave;*
- (b) the employer gives the employee 8 weeks' notice to take the annual leave; and*
- (c) the employee retains at least 6 weeks of accrued annual leave after the direction is given by the employer.*

- 6.3 These provisions would replace:
- (a) Clauses 32.6 to 32.8 of the Clerks Award
 - (b) Clauses 24.5 to 24.7 of the Children's Award
 - (c) Clauses 30.6 to 30.8 of the HIGA
 - (d) Clauses 25.5 to 25.7 of the Restaurant Award
 - (e) Clauses 31.6 to 31.8 of the SCHDS Award.

6.4 BNSW and ABI support the introduction of these clauses as they provide a much simpler process whereby directions can be given in relation to the taking of excessive annual leave accruals.

Filed on behalf of Business NSW and Australian Business Industrial by Australian Business Lawyers & Advisors:



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0408-109-622

22 December 2023

PRXXXXXX



DRAFT DETERMINATION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

s.579(2)(aa) —Promoting cooperative and productive workplace relations and preventing disputes

Modern Awards Review 2023-24

(AM2023/21)

CLERKS PRIVATE SECTOR AWARD 2020

[MA000002]

Clerical industry

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O’NEILL
COMMISSIONER TRAN

SYDNEY, XX MONTH 2023

A. Further to the Statements issued by the President on 15 September 2023 and 26 September 2023 ([2023] FWC 2481) and the Statements issued by the Full Bench of the Fair Work Commission on 4 October 2023 ([2023] FWCFB 179) and on 24 November 2023 ([2023] FWCFB 218), the above award is varied as follows:

1. By deleting clause 13.6(a) and inserting as follows:

“continuously (unless an employee has requested to work their hours non-continuously), except for rest breaks and meal breaks as specified in clause 15 —Breaks (employees other than shiftworkers).”

2. By updating the table of contents and cross-references accordingly.

B. This determination comes into operation on [DATE].

PRESIDENT



DRAFT DETERMINATION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

s.579(2)(aa) —Promoting cooperative and productive workplace relations and preventing disputes

Modern Awards Review 2023-24

(AM2023/21)

CHILDREN’S SERVICES AWARD 2010

[MA000120]

Children’s services

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O’NEILL
COMMISSIONER TRAN

SYDNEY, XX MONTH 2023

A. Further to the Statements issued by the President on 15 September 2023 and 26 September 2023 ([2023] FWC 2481) and the Statements issued by the Full Bench of the Fair Work Commission on 4 October 2023 ([2023] FWCFB 179) and on 24 November 2023 ([2023] FWCFB 218), the above award is varied as follows:

1. By deleting clause 21.2 and inserting as follows:

“Ordinary hours will be worked in periods not exceeding eight hours, in unbroken periods save for meal breaks, between Monday and Friday, unless an employee has individually requested to work their hours non-continuously. Subject to the provisions of clause 7—Individual flexibility arrangements, by agreement between and employer and an employee, an employee may be rostered to work up to a maximum 10 hours in any one day.”

2. By updating the table of contents and cross-references accordingly.

B. This determination comes into operation on [DATE].

PRESIDENT

PRXXXXXX



DRAFT DETERMINATION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

s.579(2)(aa)—Promoting cooperative and productive workplace relations and preventing disputes

Modern Awards Review 2023-24

(AM2023/21)

CLERKS PRIVATE SECTOR AWARD 2020

[MA000002]

Clerical industry

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O'NEILL
COMMISSIONER TRAN

SYDNEY, XX MONTH 2023

A. Further to the Statements issued by the President on 15 September 2023 and 26 September 2023 ([2023] FWC 2481) and the Statements issued by the Full Bench of the Fair Work Commission on 4 October 2023 ([2023] FWCFB 179) and on 24 November 2023 ([2023] FWCFB 218), the above award is varied as follows:

1. By deleting clause 10.3 and inserting as follows:

“The employer and the employee may agree to vary the regular pattern of work agreed under clause 10.2 on a temporary or ongoing basis, with effect from a future date or time. Any such agreement must be recorded in writing:

- (a) if the agreement is to vary the employee’s regular pattern of work for a particular rostered shift – before the end of the affected shift; and
- (b) otherwise – before the variation takes effect.

NOTE 1: An agreement under clause 10.3 could be recorded in writing including through an exchange of emails, text messages or by other electronic means.

NOTE 2: An agreement under clause 10.3 cannot result in the employee working 38 or more ordinary hours per week.”

2. By updating the table of contents and cross-references accordingly.
- B. This determination comes into operation on [DATE].

PRESIDENT



DRAFT DETERMINATION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

s.579(2)(aa) —Promoting cooperative and productive workplace relations and preventing disputes

Modern Awards Review 2023-24

(AM2023/21)

SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES 2010

[MA000100]

Social, community, home care and disability services

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O'NEILL
COMMISSIONER TRAN

SYDNEY, XX MONTH 2023

A. Further to the Statements issued by the President on 15 September 2023 and 26 September 2023 ([2023] FWC 2481) and the Statements issued by the Full Bench of the Fair Work Commission on 4 October 2023 ([2023] FWCFB 179) and on 24 November 2023 ([2023] FWCFB 218), the above award is varied as follows:

1. By deleting clause 10.3(e) and inserting as follows:

“The employer and the employee may agree to vary the regular pattern of work agreed under clause 10.3(c) on a temporary or ongoing basis, with effect from a future date or time. Any such agreement must be recorded in writing:

- (a) if the agreement is to vary the employee’s regular pattern of work for a particular rostered shift – before the end of the affected shift; and
- (b) otherwise – before the variation takes effect.

NOTE 1: An agreement under clause 10.3(e) could be recorded in writing including through an exchange of emails, text messages or by other electronic means.

NOTE 2: An agreement under clause 10.3(e) cannot result in the employee working 38 or more ordinary hours per week.”

2. By updating the table of contents and cross-references accordingly.
- B. This determination comes into operation on [DATE].

PRESIDENT



DRAFT DETERMINATION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

s.579(2)(aa) —Promoting cooperative and productive workplace relations and preventing disputes

Modern Awards Review 2023-24

(AM2023/21)

CHILDREN’S SERVICES AWARD 2010

[MA000120]

Children’s services

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O’NEILL
COMMISSIONER TRAN

SYDNEY, XX MONTH 2023

A. Further to the Statements issued by the President on 15 September 2023 and 26 September 2023 ([2023] FWC 2481) and the Statements issued by the Full Bench of the Fair Work Commission on 4 October 2023 ([2023] FWCFB 179) and on 24 November 2023 ([2023] FWCFB 218), the above award is varied as follows:

1. By deleting clause 10.4(d)(i) and inserting as follows:

“The employer and the employee may agree to vary the regular pattern of work agreed under clause 10.4(c) on a temporary or ongoing basis, with effect from a future date or time. Any such agreement must be recorded in writing:

- (c) if the agreement is to vary the employee’s regular pattern of work for a particular rostered shift – before the end of the affected shift; and
- (d) otherwise – before the variation takes effect.

NOTE 1: An agreement under clause 10.4(d)(i) could be recorded in writing including through an exchange of emails, text messages or by other electronic means.

NOTE 2: An agreement under clause 10.4(d)(i) cannot result in the employee working 38 or more ordinary hours per week.”

2. By updating the table of contents and cross-references accordingly.

B. This determination comes into operation on [DATE].

PRESIDENT

PRXXXXXX



DRAFT DETERMINATION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

s.579(2)(aa)—Promoting cooperative and productive workplace relations and preventing disputes

Modern Awards Review 2023-24

(AM2023/21)

HOSPITALITY INDUSTRY (GENERAL) AWARD 2020

[MA000009]

Hospitality services

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O'NEILL
COMMISSIONER TRAN

SYDNEY, XX MONTH 2023

A. Further to the Statements issued by the President on 15 September 2023 and 26 September 2023 ([2023] FWC 2481) and the Statements issued by the Full Bench of the Fair Work Commission on 4 October 2023 ([2023] FWCFB 179) and on 24 November 2023 ([2023] FWCFB 218), the above award is varied as follows:

1. By inserting after the first sentence in clause 14 the following:

“The classification by the employer must be based on the characteristics that the employer requires the employee to have, the skills that the employer requires the employee to exercise, in order to carry out the principal functions of employment.”

2. By updating the table of contents and cross-references accordingly.

B. This determination comes into operation on [DATE].

PRESIDENT



DRAFT DETERMINATION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

s.579(2)(aa) —Promoting cooperative and productive workplace relations and preventing disputes

Modern Awards Review 2023-24

(AM2023/21)

RESTAURANT INDUSTRY AWARD 2020

[MA000119]

Restaurants

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O'NEILL
COMMISSIONER TRAN

SYDNEY, XX MONTH 2023

A. Further to the Statements issued by the President on 15 September 2023 and 26 September 2023 ([2023] FWC 2481) and the Statements issued by the Full Bench of the Fair Work Commission on 4 October 2023 ([2023] FWCFB 179) and on 24 November 2023 ([2023] FWCFB 218), the above award is varied as follows:

1. By inserting after the first sentence in clause 14 the following:

“The classification by the employer must be based on the characteristics that the employer requires the employee to have, the skills that the employer requires the employee to exercise, in order to carry out the principal functions of employment.”

2. By updating the table of contents and cross-references accordingly.

B. This determination comes into operation on [DATE].

PRESIDENT



DRAFT DETERMINATION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

s.579(2)(aa)—Promoting cooperative and productive workplace relations and preventing disputes

Modern Awards Review 2023-24

(AM2023/21)

SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

[MA000119]

Social, community, home care and disability services

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O'NEILL
COMMISSIONER TRAN

SYDNEY, XX MONTH 2023

A. Further to the Statements issued by the President on 15 September 2023 and 26 September 2023 ([2023] FWC 2481) and the Statements issued by the Full Bench of the Fair Work Commission on 4 October 2023 ([2023] FWCFB 179) and on 24 November 2023 ([2023] FWCFB 218), the above award is varied as follows:

1. By inserting a new clause 13.3 following clause 13.2 as follows:

“The classification by the employer must be based on the characteristics that the employer requires the employee to have, the skills that the employer requires the employee to exercise, in order to carry out the principal functions of employment.”

2. By updating the table of contents and cross-references accordingly.

B. This determination comes into operation on [DATE].

PRESIDENT



DRAFT DETERMINATION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

s.579(2)(aa) —Promoting cooperative and productive workplace relations and preventing disputes

Modern Awards Review 2023-24

(AM2023/21)

CHILDREN’S SERVICES AWARD 2010

[MA000120]

Children’s services

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O’NEILL
COMMISSIONER TRAN

SYDNEY, XX MONTH 2023

A. Further to the Statements issued by the President on 15 September 2023 and 26 September 2023 ([2023] FWC 2481) and the Statements issued by the Full Bench of the Fair Work Commission on 4 October 2023 ([2023] FWCFB 179) and on 24 November 2023 ([2023] FWCFB 218), the above award is varied as follows:

1. By inserting after the first sentence in clause 13.1 the following:

“The classification by the employer must be based on the characteristics that the employer requires the employee to have, the skills that the employer requires the employee to exercise, in order to carry out the principal functions of employment.”

2. By updating the table of contents and cross-references accordingly.

B. This determination comes into operation on [DATE].

PRESIDENT

SCHEDULE 4

PRXXXXXX



DRAFT DETERMINATION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

s.579(2)(aa)—Promoting cooperative and productive workplace relations and preventing disputes

Modern Awards Review 2023-24

(AM2023/21)

CLERKS PRIVATE SECTOR AWARD 2020

[MA000002]

Clerical industry

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O'NEILL
COMMISSIONER TRAN

SYDNEY, XX MONTH 2023

A. Further to the Statements issued by the President on 15 September 2023 and 26 September 2023 ([2023] FWC 2481) and the Statements issued by the Full Bench of the Fair Work Commission on 4 October 2023 ([2023] FWCFB 179) and on 24 November 2023 ([2023] FWCFB 218), the above award is varied as follows:

1. By inserting a new clause as follows:

“X Exemption Rate

X.1 An employer and a full time employee paid at Levels 3, 4 or 5 rate of pay may enter into an agreement to pay the employee no less than 155% of their relevant Level weekly rate of pay as set out in clause 16 Minimum Rates of this award (**the Exemption Rate**).

X.2 Where an agreement to pay the Exemption Rate has been made, the following clauses of this award shall not apply:

- (a) clause 15.4 (Breaks - penalty)
- (b) clause 16 (Minimum Rates)
- (c) clause 19 (Allowances)
- (d) clause 21 (Overtime)

- (e) clause 22.4 (Rest period after working overtime)
- (f) clauses 24.1 to 24.3 (Penalty Rates)
- (g) clause 32.3 (Annual leave loading)

X.3 Where an agreement has been made to pay an employee the Exemption Rate:

- (a) the Exemption Rate remunerates employees for up to 50 hours work per week (or 50 hours per week averaged over up to 4 weeks);
- (b) for hours worked in excess of 50 hours per week (or 50 hours per week averaged over up to 4 weeks), the employee must be paid 200% of the employee's base rate of pay for their Level under clause 16; and
- (c) for any hours worked on a public holiday, the employee must be paid in accordance with clause 37 of this Award based on the employee's base rate of pay for their Level under clause 16.

X.4 The Exemption Rate shall be the rate for the purposes of calculating:

- (a) personal leave;
- (b) annual leave; and
- (c) superannuation.

X.5 Clause X does not apply to shiftworkers.

NOTE: Under the NES (see section 62 of the Act) an employee may refuse to work additional hours if they are unreasonable. Section 62 sets out factors to be taken into account in determining whether the additional hours are reasonable or unreasonable.”

- 2. By updating the table of contents and cross-references accordingly.
- B. This determination comes into operation on [DATE].

PRESIDENT