

Modern Awards Review 2023-24 (AM2023/21)

Submission cover sheet

Name

Nigel Ward, Australian Business Lawyers & Advisors

Organisation

Representing Business NSW and Australian Business Industrial

Contact details:

Street: Level 7, 8 Chifley Square

Suburb/City: Sydney NSW

Postcode: 2000

Email: Nigel.Ward@ablawyers.com.au;
Lewis.Roper@ablawyers.com.au;
Alana.Rafter@ablawyers.com.au

Telephone: 0405 539 172

Modern Award Review Stream:

Arts and Culture:

Job Security:

Work and Care:

Usability of
awards:

BNSW AND ABI 'FLEXIBLE PART-TIME CATEGORY' PROPOSAL

1. On 4 March 2024, the Commission granted BNSW and ABI leave to file a proposal setting out the "*flexible part-time employment category*" referred to in submissions filed on 21 February 2024.
2. We **attach** a draft determination setting out the proposal, which we will speak to at the consultation session listed for 14 March 2024.
3. This is advanced as a consideration should union proposals to diminish the operability of casual employment be accepted or a capacity to flex up part time hours by agreement at ordinary rates (promoting income creation and security of work) as set out in several of the awards under consideration is rejected.

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

Nigel Ward

CEO + Director

Australian Business Lawyers & Advisors

Lewis Roper

Senior Workplace Relations Advisor

Australian Business Lawyers & Advisors

Alana Rafter

Senior Associate

Australian Business Lawyers & Advisors

13 March 2024



DRAFT DETERMINATION

Fair Work Act 2009
s.157

XXX AWARD 20XX
(AM2023/21)

XXXX
XXXX
XXXX

XXXX, XX XXXX 202X

XXX 20XX

A. Further to the decision issued on XXX in [202X] FWCFB XXXX), it is determined pursuant to section 157(1)(a) of the *Fair Work Act 2009* that the XXX Award 20XX be varied as follows:

1. By inserting a new clause X.X as follows:

X.X Flexible ongoing employment

- (a) A flexible ongoing employee is an employee designated and paid as such by the employer.
- (a) A flexible ongoing employee will be paid an hourly rate equal to 1/38th of the weekly rate appropriate to the employee's classification plus a loading of 10%.

Note: Flexible ongoing employees are entitled to the benefits of the National Employment Standards. This includes entitlements that are expressed not to apply to casual employees.

- (b) Subject to X.X (c), the employer may roster a flexible ongoing employee to work such ordinary hours as they determine less than 38 each week.
- (c) Flexible ongoing employees will be paid:
 - (i) xx minimum number of hours, at the appropriate rate, for each week during which the employee works; and
 - (ii) xx minimum number of hours, at the appropriate rate, each week.

- (d) No full-time or part-time employee will be transferred to flexible ongoing employment without the written consent of the employee. No full-time or part-time employee is to have their employment terminated in order to convert that employee to flexible ongoing employment.
- (e) For the purposes of determining an employee's ordinary hours of work in respect of NES entitlements, the ordinary hours of a flexible ongoing employee on any given day will be:
 - (i) the average hours the employee worked on that day of the week over the previous 4 weeks, other than hours which are to be paid at overtime rates in accordance with clause xx; or
 - (ii) the hours the employee has been rostered to work on the relevant day, other than hours which are to be paid at overtime rates in accordance with clause xx,

whichever is the greater.
- (f) An employer shall not reduce or vary a flexible ongoing employee's hours for the purpose of avoiding any right or obligation to leave or redundancy payments payable under the NES.

2. By inserting a new clause X.X as follows:

X.X Right to request flexible ongoing conversion

- (a) A person engaged by a particular employer as a regular flexible ongoing employee may request that their employment be converted to full time or part-time employment.
- (b) A regular flexible ongoing employee is a flexible ongoing employee who has in the preceding period of 12 months worked a pattern of hours on an ongoing basis which, without significant adjustment, the employee could continue to perform as a full-time employee or part-time employee under the provisions of this award.
- (c) A regular flexible ongoing employee who has worked equivalent full-time hours over the preceding period of 12 months' employment may request to have their employment converted to full-time employment.
- (d) A regular flexible ongoing employee who has worked less than equivalent full-time hours over the preceding period of 12 months' employment may request to have their employment converted to part-time employment consistent with the pattern of hours previously worked.
- (e) Any request under this subclause must be in writing and provided to the employer.

- (f) Where a regular flexible ongoing employee seeks to convert to full-time or part-time employment, the employer may agree to or refuse the request, but the request may only be refused on reasonable grounds and after there has been consultation with the employee.
- (g) Reasonable grounds for refusal include that:
 - (i) it would require a significant adjustment to the regular flexible ongoing employee's hours of work in order for the employee to be engaged as a full-time or part-time employee in accordance with the provisions of this award – that is, the regular flexible ongoing employee is not truly a regular flexible ongoing employee as defined in paragraph (b);
 - (ii) it is known or reasonably foreseeable that the regular flexible ongoing employee's position will cease to exist within the next 12 months;
 - (iii) it is known or reasonably foreseeable that the hours of work which the regular flexible ongoing employee is required to perform will be significantly reduced in the next 12 months; or
 - (iv) it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee's hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.
- (h) For any ground of refusal to be reasonable, it must be based on facts which are known or reasonably foreseeable.
- (i) Where the employer refuses a regular flexible ongoing employee's request to convert, the employer must provide the employee with the employer's reasons for refusal in writing within 21 days of the request being made. If the employee does not accept the employer's refusal, this will constitute a dispute that will be dealt with under the dispute resolution procedure in clause xx. Under that procedure, the employee or the employer may refer the matter to the Fair Work Commission if the dispute cannot be resolved at the workplace level.
- (j) Where it is agreed that a flexible ongoing employee will have their employment converted to full-time or part-time employment as provided for in this clause, the employer and employee must discuss and record in writing:
 - (i) the form of employment to which the employee will convert – that is, full-time or part-time employment; and
 - (ii) if it is agreed that the employee will become a part-time employee, the matters referred to in clause X.X (c).

- (k) The conversion will take effect from the start of the next pay cycle following such agreement being reached unless otherwise agreed.
- (l) Once a flexible ongoing employee has converted to full-time or part-time employment, the employee may only revert to flexible ongoing employment with the written agreement of the employer.
- (m) A flexible ongoing employee must not be engaged and re-engaged (which includes a refusal to re-engage), or have their hours reduced or varied, in order to avoid any right or obligation under this clause.
- (n) Nothing in this clause obliges a regular flexible ongoing employee to convert to full-time or part-time employment, nor permits an employer to require a regular flexible ongoing employee to so convert.
- (o) Nothing in this clause requires an employer to increase the hours of a regular flexible ongoing employee seeking conversion to full-time or part-time employment.
- (p) An employer must provide a flexible ongoing employee, whether a regular flexible ongoing employee or not, with a copy of the provisions of this subclause within the first 12 months of the employee's first engagement to perform work.

3. (Making such other consequential amendments as required).

B. This determination comes into operation from XX XXXX 202X. In accordance with s.165(3) of the *Fair Work Act 2009* these items do not take effect until the start of the first full pay period that starts on or after XX XXXX 202X.

[Insert the Seal of the Fair Work Commission]

XXXX