



Modern Awards Review 2023-24 (AM2023/21)

Submission cover sheet

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AM2023/21 – Review of Modern Awards 2023 – 2024

Work & Care

ASU Reply Submission

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INTRODUCTION

1. The ASU is one of Australia's largest unions, representing approximately 135,000 members. ASU members work in a wide variety of industries and occupations in the private, public and community sectors. Relevantly, we are the largest national union in the community and disability sector, the local government sector and the aviation sector. We are also the national union for private sector clerical and administrative workers.
2. This submission addresses several proposals made by employer groups in the Work and Care Topic of the Review of Modern Awards (**'the Review'**). These proposals are little more than a cynical attack on the concept of a modern award safety net under the guise of addressing the significant problems associated with work and care. These proposals should be rejected.
3. The ASU supports the submissions of the Australian Council of Trade Unions (**'ACTU'**). We reiterate the following ACTU submissions:
 - a. that the findings of the Senate Select Committee on Work and Care should be given significant weight (**'Work and Care Report'**); and
 - b. that the Commission should consider proposals for legislative reform in the context of the Review.

WORKING FROM HOME

4. The ACTU and ASU have proposed a universal right to request working from home arrangement. This proposal offers employees the choice to request a working location that best suits their needs.
5. The benefit of working from home to employees is better work/life balance. Working from home means no commuting time, no unplanned interruptions in the office and more control over working space. Free from the distractions of the workplace, an employee can work productively during their working hours and get on with life at finishing time.
6. AI Group has proposed that awards should be varied to permit employers and employees to agree to vary modern award working time protections when an employee works from. The benefit of a working from home arrangement evaporates if the employee starts work at 6.00am and work in discontinuous periods until 8.00 pm or 9.00 pm. Under AI Group's proposal, a person's life would be limited to working, caring and sleeping.
7. Award-reliant employees are unlikely to be given the flexibility to choose their own hours and intersperse work with personal matters. The disparate bargaining power between employers and award-reliant employees means that it is more likely that employers will make working

from home arrangements conditional on accepting the employer's preferred hours of work. The flexibility to pause work and go to a yoga class is more likely to be given to executive employees than to award covered workers. Where an employee needs to vary their working hours to meet caring arrangements, this should be done through a flexible working arrangement to ensure the changes reflect the employee's needs and not the employer's preferences.

8. In the Making Awards Easier to Use Topic, AI Group made a similar proposal for 'remote work' where the employee is not working at a designated workplace. Award-reliant employees are unlikely to be given the discretion to choose where they work. In our members experience, working from home arrangements come with a clear directive about where work should be performed. Call centre operators and FDV practitioners are not doing their job from cafes or poolside in Bali. The discretion to choose your work location when working remotely is more likely to be offered to executive employees. Such a clause is irrelevant to the modern award safety net.
9. Some employer groups have made submissions about employees attending to personal matters while working from home (e.g. laundry) during the Review to justify weakening working time protections for employees working from home. This submission should not be accepted:
 - a. many employers use the same management software to manage time at home and in the workplace to maintain their preferred rate of labour utilisation;
 - b. some members report that working from home is associated with significant work intensification. For example, many professional workers report that online meetings are schedule back-to-back, where physical meetings may be scheduled at significant intervals; and
 - c. the Commission would also need evidence about the rate of labour utilisation in traditional workplaces to draw any meaningful conclusions about the difference when working from home.
10. Further, overtime meal allowances should be paid when workers perform overtime while working from home. These allowances are designed to compensate employees for the additional cost of purchasing food associated with working overtime. This cost is still borne by employees working from home. The idea that an employee who works four hours of overtime after a full day's work does not need to purchase a takeaway meal relies on the gendered assumption that they will have another person cooking food for them.

PART TIME WORK & MINIMUM ENGAGEMENTS

11. AI Group declares that modern award part time employment arrangements are 'overwhelmingly rigid and inflexible'. To solve this problem, they propose to significantly increase the power of employers to unilaterally set and change the working hours of employees.
12. AI Group's proposals include offering employers a stronger unilateral decision-making power in fixing and changing hours of work, the option for employees to agree to work additional hours at ordinary rates, and the option to for employees to agree to reduce minimum engagement or payment periods.
13. The ASU refers to paragraphs 16 through 35 of its submission in the Work and Care Topic and paragraphs 17 through 28 of its Submission in the Job Security Topic. The examples in the community and disability sector and the airline industry are particularly illustrative.

Hours of Work

14. On the contrary, modern award part-time employment provisions give employers too much power over employee's working time. Our members report employer deliberately use part-time employment because it is so flexible, particularly when employers can increase employees' work hours at ordinary rates. Combined with the weak rostering rules in many awards, part-time employees often have little control over how many hours they work each week or when they work those hours. In many cases, these gaps in our safety net allow employers to engage employees as part-time workers but roster them to work full-time hours.

Minimum Engagement & Payment Periods

15. Minimum engagement periods are particularly important for part-time and casual employees. The purpose of a minimum payment period is to ensure that an employee cannot be pressured to accept exploitatively short periods of work.
16. As the Full Bench noted in the Part-Time Employment and Casual Employment Case, the purpose of minimum engagement terms was to ensure that:

the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like. An employment arrangement may become exploitative if the income provided for the employee's labour is, because of very short engagement periods, rendered negligible by the time and cost required to attend the employment.

Minimum engagement periods are also important in respect of the incentives for persons to enter the labour market to take advantage of casual and part-time employment opportunities (and thus engage the consideration in paragraph (c) of the modern awards objective in s.134.¹

17. AI Group's proposal would expose award-reliant employees to employer pressure to accept exploitative employment arrangements.
18. We do believe that there is merit in AIG Group's proposals for minimum payment periods. The award provides a fair and relevant safety net if the employee receives an appropriate sum of money to compensate them for the expense and inconvenience of attending work. There is no reason an employer should be obliged to contrive duties to fill a minimum engagement.
19. However, the AI Group proposal that minimum payment periods would only apply where the employee is 'ready, willing and able to work' should be rejected. Firstly, the proposal undermines the protective purpose of a minimum payment period: to guarantee an employee income. Secondly, the AI Group proposal is likely to lead to disputation over whether an employee is ready, willing and able to work. It is unclear how this term would apply in practice. For example, how would the clause apply when an employer told an employee that 'you leave work if they wanted to, there's nothing for you to do now?' Would that employee who opted to leave work then be 'ready, willing and able to work'?

Additional Hours

20. Part-time employees covered by the SCHDS Award are not entitled to overtime until they have worked 10 hours in a day or 38 hours in a week. While employers cannot require an employee to work additional hours, this protection is meaningless in practice. Firstly, many SCHDS Award employees are required to comply with statutory or regulatory requirements that mean they cannot simply refuse additional hours. For example, out of home care workers are legally responsible for the children in their care. They cannot leave the employers premises until they are relieved from duty. Secondly, the absence of overtime penalties means that there is no incentive to match part-time employment arrangements with the employee's actual working hours. This has led to the proliferation of short hours contracts (some with as few as ten guaranteed hours in any week).

¹ [399]

TOIL AND MAKE UP TIME

21. ACCI and AI Group have made various proposals regarding time off instead of payment for overtime (**TOIL**) and make up time arrangements. The Commission should reject the proposals to:
 - a. allow a standing agreement to use TOIL instead of overtime payments;
 - b. allow TOIL to be banked for longer periods; and
 - c. include a make-up time provision in every Modern Award.
22. The Commission should exercise caution before adopting any of these recommendations. Overtime has a significant role in the modern award safety net by ensuring that employees are compensated for the costs and inconvenience associated with working additional hours. The cost and inconvenience of working additional hours is more significant for employees with caring responsibilities. Early childhood education centres, disability services, schools and aged care providers cannot offer services that can be changed at the whim of a carer's employer. Part-time employees may also have other reasons to work part-time (such as study) with fixed time commitments. It is more important that employees with caring responsibilities are compensated for additional hours with overtime rates.
23. It is a widespread practice in the Community and Disability sector to require employees to accept TOIL instead of overtime payments and negotiate complex TOIL terms in enterprise agreements. Members regularly complain that it is difficult to track their entitlement to TOIL and difficult to take TOIL at times suitable to their needs.
24. Further, the employers find that compliant TOIL systems have significant problems. Firstly, a preference for TOIL often leads to large TOIL accruals. Employers find it difficult to find time for staff to take their accrued TOIL and end up paying it out. Secondly, TOIL requires complex recording keeping arrangements that track employee working time over long periods. Finally, the administrative burden often leads to underpayments when TOIL accruals are not properly recorded or paid out. Indeed, our observation is that value of a TOIL arrangement to many employers is to facilitate non-compliance.
25. The modern award system should provide employees with employees should have secure, predictable and stable working hours. Overtime payments offer flexibility to employers and appropriate compensation to employees when they work outside their rostered or contractual ordinary hours of work.

ROSTERING ARRANGEMENTS

26. AI Group propose that awards containing pre-existing rostering provisions should be varied to permit an employer and employee to agree to a roster variation at any time, and to provide a unilateral right for an employer to vary the roster with a brief period of notice in the event of 'unforeseen circumstances'.
27. The ASU has already addressed the problems with 'flexible' rostering practices in our industries. We refer to the paragraphs 24 through 27 of our Submission in the Work and Care Topic and 11 through 16 of our submission in the Job Security Topic.
28. In relation to the AI Group proposal, we note that:
 - a. The proposition that an employer and employee may agree to change rosters at any time is incompatible with the concept of a modern award safety net. It risks subjecting employees to significant pressure to vary their rosters.
 - b. We are not opposed to the concept of employee-to-employee shift swaps. However, many employers find these schemes difficult to manage in practice. This proposal requires an award-by-award consideration.
 - c. The proposal to permit unilateral short notice variations for 'unforeseen circumstances' would encourage poor management practices by offering a catch-all exemption for poor forward planning.
29. The modern award system provides flexibility to employers and appropriate compensation to employees through overtime payments.

AUSTRALIAN SERVICES UNION

26 March 2024