



Modern Awards Review 2023-24 (AM2023/21)

Submission cover sheet

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How to prepare a submission

Submissions should be emailed to awards@fwc.gov.au. Directions set out the due dates for submissions. Directions are issued by a Member of the Commission and will be published on the [Commission website](#).

Make sure you use numbered paragraphs and sign and date your submission.

Your submission. Provide a summary of your experience and any relevant issues. You may wish to refer to one or more of the issues outlined in the relevant discussion paper.

Issues

1. [Using numbered paragraphs, outline the main issues you want the Fair Work Commission to consider as part of the Modern Award Review 2023-34 including your responses to any questions set out in Commission discussion papers. Include, if possible, references to any relevant sections of the *Fair Work Act 2009*, or other legislation or specific clauses in modern awards that apply].

Proposals

2. [Tell us your proposals to the address the issues you have raised in the submission. If you are proposing that the Commission should consider varying an award, you should include draft wording for the proposed variation]

Signature:



Name:

SCOTT BARKLAMB

Date:

22 December 2023

BCA

Business Council of Australia

Fair Work Commission:
Modern Awards
Review 2023-24
(AM2023/21)
Making Awards
Easier to Use

Submission of the Business
Council of Australia

December 2023

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Executive Summary

Key Conclusions:

- Australia's workplace relations system must be agile, flexible and efficient so Australian businesses are competitive, and more Australians can be better matched to high paying jobs.
- Modern awards, including the seven being considered as part of this review, are a key part of Australia's workplace relations system.
- Modern awards build on the National Employment Standards (NES), provide an essential safety net for workers and are the foundation for enterprise agreements, which can deliver higher-paid and sustainable jobs. However, the complexity of awards is hindering the uptake of agreements.
- The current modern awards continue to contain outdated restrictions and concepts of work that no longer respond to the workplaces of today, including the different ways in which people want to work.
- Awards are complex, technical and lack clarity, which are very often not understood by both employees and employers.
- Underpayments are very often the result of unintended errors due to the complexity of the awards.
- Previous reviews have delivered only partial successes in modernising award regulation.

Key Recommendations:

- Awards must be substantially simplified.
- A clear vision, target or model should guide the future structure and content of awards.
- Awards should be clear, easy to understand and in plain English, so employers and employees are aware of their responsibilities and entitlements.
- Outdated restrictions should be removed, to enable more flexibility to support new ways of working.
- A focus for reform should be where there is an identified pattern of unintended errors because of complexity and a genuine misunderstanding.
- New tools should be made available to clarify award coverage.
- A reduced number of awards should cover broader and more generic industry sectors.
- Common matters in awards, prescribing identical entitlements should be in standard wording.
- Awards should focus on terms of employment, wage categories, allowances and move away from non-wage conditions.
- Awards should have fewer instruments prescribing a reduced number of separate minimum wage rates and a far simpler application to hours worked.
- There should be a clearer delineation between awards and the NES.
- The clarity and useability of further reformed awards should be tested with employer and employee focus groups.
- The Commission should issue an exposure draft of its proposed final report and recommendations in this review and invite any final input.

1. Introduction

1. We thank the Fair Work Commission (the Commission) for the opportunity to make this submission as part of the Modern Awards Review 2023–24 (the Review)¹.
2. The Business Council of Australia (BCA) represents more than 120 of Australia’s largest businesses, employing over a million Australians. The BCA works to ensure Australia is economically strong to support a fair, free, and inclusive society. Achieving this requires successful, well-run businesses that create meaningful jobs and inclusive work environments which reflect and are accountable to the broader Australian community.
3. The BCA seeks to ensure:
 - Australians have access to safe, high-paying, sustainable jobs that reward people for their hard work and experience.
 - Work can bring out the best in people, giving them access to new opportunities and enabling them to collaborate with employers to create a positive and rewarding work environment.
 - Australian workplaces are responsive to the future of work, enable innovation, ingenuity, and collaboration, and offer clear reward for effort.
 - Australia’s workplace relations system:
 - Offers tools to tackle productivity challenges head on while empowering and protecting workers.
 - Focuses on driving enterprise-level innovation and ingenuity, which will lead to job creation.
 - Is a source of national competitive advantage.

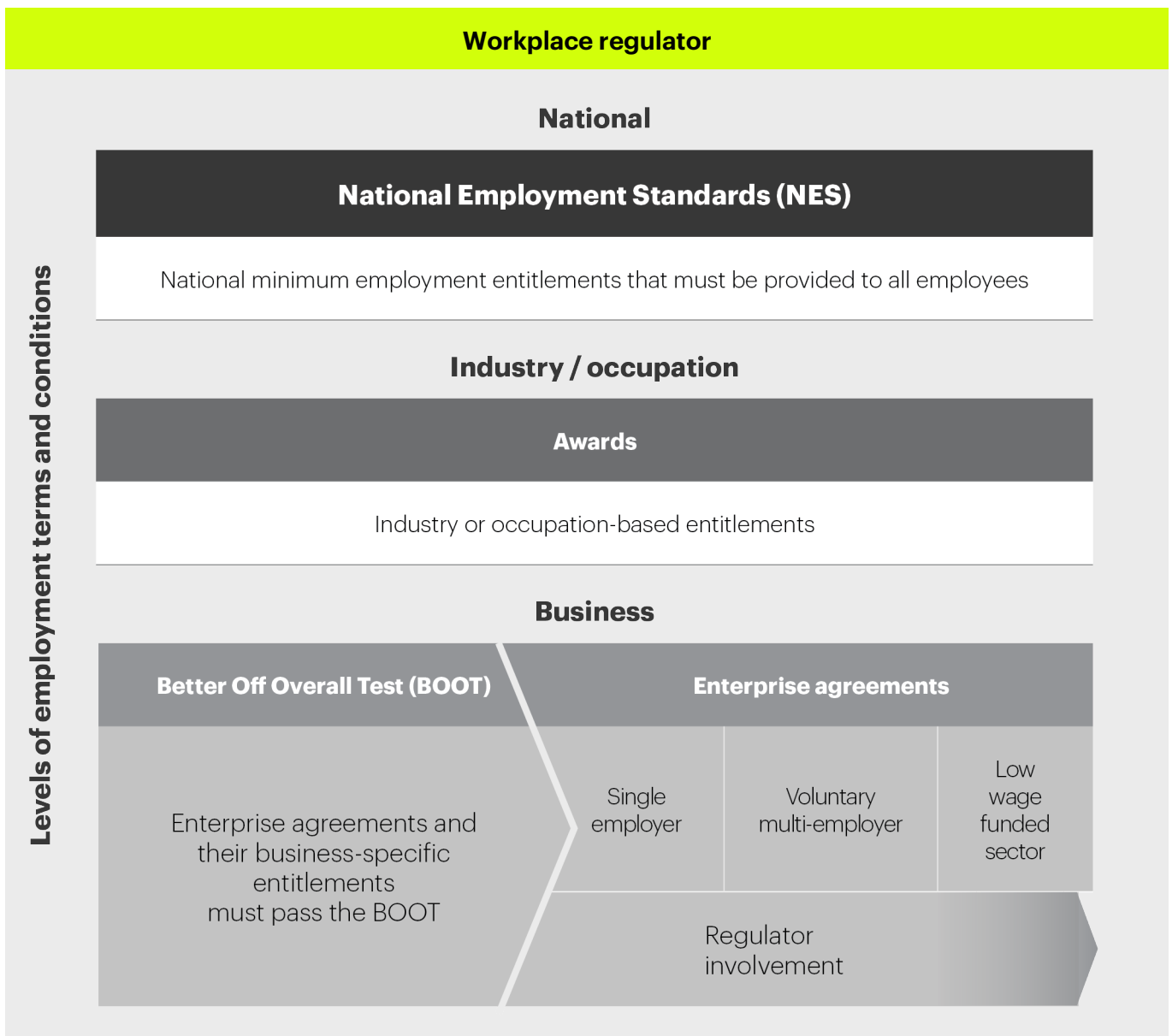
■ A workplace relations system that continues to prevent workers and businesses from determining their own arrangements will dramatically limit the capacity of businesses to grow and provide the higher-paid, sustainable jobs of the future.

BCA Seize the Moment, 2023 ■

4. By better enabling Australians to work together, we can deliver incentives for new investment and significantly increase our global competitiveness.
5. Key principles for workplace regulation should see:
 - Australian workplaces able to be agile, flexible, and efficient so more Australians can be better matched to higher-paying jobs.
 - Workers able to choose how they work rather than having a framework imposed on them which may not reflect the needs and desires of the modern workforce.
 - Companies able to adapt and innovate to remain globally competitive.
 - Workers protected from unsafe work practices and exploitation.

¹ [2023] FWCFB 179

- Wage-setting mechanisms aligned with and supporting productivity outcomes, including through voluntary and mutually empowering enterprise bargaining.
 - Australian enterprises able to adopt new technologies and new ways of doing business, particularly where they deliver improved outcomes for customers (in price, quality, service, and safety), employees (flexibility, opportunity, lifestyle and pay), companies and the broader economy.
 - Businesses supported in responding to changing consumer demand and expectations, and able to scale as required to leverage opportunities and compete globally.
6. This should include removing tensions that prevent collaboration between employers and employees and that stop us unleashing the potential of every Australian.
 7. The BCA's **Seize the Moment** policy reform blueprint² articulates a framework for the regulation of work in Australia based on the following flexible and fair workplace relations framework:



² BCA (2023) [Seize the Moment](#)

1.1 Overview

8. Australia's workplace relations system has historically developed and is based on a unique³ industrial award system which (along with legislated National Employment Standards (NES)) sets minimum terms and conditions of employment, with those awards determined by a national industrial tribunal under parameters set by the Fair Work Act 2009 (FW Act).
9. BCA members have various interests in the ease and reliability of using modern awards:
 - Some apply modern awards, employing 'on the award' to deliver key frontline customer and client services, production, operations, and administrative functions.
 - BCA members also employ on 'over award' arrangements, in which a modern award is applicable to set a baseline against which benefits may be measured, but rates of pay exceed those in the award other than through an enterprise agreement or other Fair Work Instrument.⁴
 - BCA members use enterprise agreements⁵, which have a clear connection to the useability, reliability, clarity, and practicality of modern awards.
10. Various reviews and consolidations have been undertaken to ensure awards can meet changes to their role as our workplace relations system has changed. These processes have delivered partial successes in genuinely modernising award regulation, and in delivering on the role awards would play in the fair and flexible system outlined above.
11. For most employers and employees, however, awards are no easier to use and comply with than they were prior to 2009.⁶ Complexity, ambiguity and subjectivity continue to make modern awards hard to interpret. This makes them difficult to apply, which is not in the interests of both employers and employees (see Section 2).
12. A number of long-standing and widely understood industry and award specific interpretations preceding the pre-FW Act era were also removed during the award modernisation process. Well understood approaches have also been overturned in further plain language redrafting. Whilst they have been presented as not making substantive changes, they have had the effect of changing employer obligations, such as through changes impacting the span in which ordinary hours may be worked under the General Retail Award.
13. Making modern awards easier to use should tackle the problems in the award system set out in Section 2 of this Submission.
14. As set in out in Section 3, making awards easier to use should mean ensuring awards are simpler, clearer, and more reliable to apply, and better support compliance and agreement making.

This part or stream of the current Review, 'Making awards easier to use', should be treated as an opportunity to substantially improve award regulation to be fit for purpose in contemporary workplaces.

■ Awards should make it 'easy to work, easy to pay, easy to understand'.

BCA Member ■

³ New Zealand also had an award system until the late 1980s.

⁴ Some may also remain subject to preserved and transitional arrangements.

⁵ Or potentially on other transitional or preserved arrangements provided for under the Fair Work Act 2009.

⁶ Which saw the passage of the current Fair Work Act.

15. The BCA urges the Commission to not allow this part of the Review to become another protracted, costly but ultimately disappointing exercise which fails to deliver important changes which improve the outcomes for employees and employers.
16. This Submission proceeds on the basis that:
- Core elements of the employment safety net in Australia will continue to be delivered by awards, made by the Commission. However, as we approach the mid-21st century, awards will need to change to be fit for purpose, and do a better job for employees, employers, and the community.
 - The effectiveness, clarity and application of modern awards can be improved significantly, ensuring the award safety net is targeted, effective, well-structured, fair, and practical.
 - The structure and content of modern awards should change, as they have changed at various times across the past 116 years.⁷
 - Changes should be based on a clear plan or vision for awards, setting out guiding principles, the outcomes award reform is working towards, and roadmaps to get there (see Section 3).

1.2 Delivering award reform through this review

17. The BCA does not intend to propose specific variations to the seven awards to which this Review is directed.⁸ Rather, we have examined the state of the modern award system broadly, reflected on preceding award reviews, and recommended a framework and principles that we urge the Commission to adopt in the Review and in making recommendations to Government.

18. The President's Statement of 15 September 2023⁹ indicates that:

[8] Following the conferences, a final report will be issued which will conclude the review process. The report might provide recommendations about possible next steps if parties seek variations to modern awards or propose that the Commission take steps on its own motion to vary awards.

And

[10] The final report of the review will assess the merits of any proposal advanced and may recommend possible next steps if parties seek variations to modern awards or propose that the Commission takes steps on its own motion to vary awards.

19. The Commission's existing legislative capacities under the FW Act should not limit the considerations raised by this Review, nor the Commission's final recommendations to Government. The BCA sees no barrier to the Commission comprehensively engaging with options for an improved award system.

1.3 Vision for a 21st century award system

20. The award system should be substantially simplified, with fewer instruments prescribing fewer separate minimum wage rates, and a far simpler application to hours worked.

21. Awards should be based on broader, more generic industry sectors.

22. The variable application of awards between industries should focus on terms of employment (wages, classifications, allowances). Non-wage conditions could be increasingly standardised across all awards in wording and application.

⁷ The Harvester Judgement ((1907) 2 CAR 1, Higgins J, President, 8 November 1907) was handed down on 8 November 1907.

⁸ Children's Services Award 2010, Clerks – Private Sector Award 2020, Fast Food Industry Award 2010, General Retail Industry Award 2020, Hospitality Industry (General) Award 2020, Restaurant Industry Award 2020, and the Social, Community, Home Care and Disability Services Industry Award 2010 ([here](#))

⁹ [President's Statement](#) - Modern Awards Review 2023-24, 15 September 2023

23. Awards should be in plain English and be able to be clearly understood and applied by businesses and employees. Ideally, they would move towards becoming descriptions of classifications and schedules of current minimum rates and allowances.
24. Outdated restrictions and concepts of work should be removed, enabling greater flexibility to support new ways of working.

1.4 Deliver a national system

25. Reforming Australia's workplace relations system should proceed from a recognition of the value and importance of nationally consistent approaches, and of delivering truly national regulation. Two priorities stand out as follows.

Completing the national system

26. The national workplace relations system covers all private sector employment in New South Wales, Queensland, South Australia, Tasmania, Victoria, the ACT and NT.
27. The anomaly is Western Australia in which the national system applies only to those employed by a constitutional corporation, leaving out partnerships, sole-traders, and some others who are subject to state private sector awards.
28. An award system for the future cannot have almost complete coverage of the private sector and retain state award coverage in a single state. Recommendations to Government should include reengaging with the State of Western Australia to have it join the other states in referring necessary constitutional powers for genuinely national award regulation in the private sector.

Driving reform nationally

29. Changes to workplace regulation should be driven solely at the national level and apply consistently to work throughout Australia. State governments should focus on areas of their specific residual legislative responsibility such as long service leave and prescribing public holidays, and not seek to impose additional state regulation on national system employers covered by the FW Act.

2. Addressing problems with the current award system

30. Significant effort has been expended to make modern awards, review them, and then review them again, and to translate thousands of pre-modern state and federal awards into the current 121 modern awards.
31. Notwithstanding these efforts, there is an imperative for further, more ambitious, and more systematic improvements to the quality and application of modern awards.
32. The following problems and opportunities for improvement should be addressed in this Review and taken forward as foundations for an award system appropriate to employment in the 21st century.

2.1 Awards are not well understood by employers and employees

33. There is a significant lack of understanding of which awards apply to which employees.
34. Awards remain highly legalistic and complex documents which non-experts cannot pick up and apply with confidence or reliability.
35. Australia's awards have always been complex and detailed. Awards have long applied different pay obligations based on when work is undertaken, through complex rostering, overtime, and penalty rate arrangements, which overlay complex classification and coverage considerations.
36. Award complexity¹⁰ can be particularly harmful for employees for whom English is not a first language and others without higher-level reading and comprehension skills, many of whom work on awards and should be able to understand their rights and obligations.
37. Employers are also placed in the difficult situation of not being able to reliably explain awards to employees, due to the legal risks this can create. This does not support clarity and transparency in employment, nor cooperative and productive workplace relations.¹¹

2.2 Award complexity undermines compliance

38. Despite the efforts of the Commission, unions, and employer representatives, and what is now the FWO, understanding and applying pay obligations in awards remains a very complex and highly specialised undertaking. Too often this complexity results in errors where those responsible for their application unintentionally misapply the correct requirements, despite their best endeavours.
39. A wide range of public and private sector organisations have experienced problems in complying with employment obligations under awards and agreements based on awards. Underpayments occur not just in small businesses with lower HR capacities and less access to advice, but also in major organisations (public, private¹² and charitable sectors) despite making considerable investments in meeting their payment obligations.¹³
40. If Australia wants to reduce underpayments, award quality, consistency, complexity, and subjectivity need to be acknowledged and addressed.
41. Examples of complexity and complication include:

¹⁰ Subjectivity, ambiguity, inconsistency, vagary, excessive legalism etc.

¹¹ Fair Work Act 2009, s 3

¹² Including Government departments with considerable administrative resources to meet compliance obligations.

¹³ Underpayments have also occurred in Australia's leading charities, and even in the Department of Employment and Workplace Relations, and in a pre-eminent union aligned industrial relations law firm.

- 50-to-100-page awards giving rise to further 30 to 90 page pay summaries that employers need to be able to apply an award.
- Classifications in hospitality differentiated based on picking up plates but not bringing them to tables; a highly impractical distinction or practice in a busy café or restaurant.¹⁴
- Classifications in pubs and bars differentiated based on the subjective notion of making “sophisticated drinks”.¹⁵
- Classifications in other awards differentiated based on undefined, inherently subjective concepts such as “more advanced skills” or “difficult assignments”.¹⁶
- Applying parallel awards for workers serving the same customers in similar work and workplaces, as occurs in parts of retail and hospitality, but with the two awards offering differing levels of flexibility and prescription.
- Inconsistent application of like concepts in different modern awards that operate within retail operations, such as the General Retail Industry Award and Clerks - Private Sector Award.¹⁷
- Rostering issues, with the Yellow Canary payroll service observing:

In our experience, the General Retail Industry Award is one of the most complex awards when it comes to rostering arrangements for full time and part time staff. There are multiple rules relating to consecutive days off, maximum days in a week, and regular Sunday work that need to be considered when rostering employees. In many respects these rules overlap or, in practice, deal with the same scenarios.

Employers are often scratching their heads when it comes to implementing these rules, including in the order in which the rules should be applied. Adding to the complexity, a number of the rules are applied across two-week roster cycles, while others operate across four weeks. Many payroll systems simply are not configured and equipped to calculate entitlements that arise outside of their built-in payroll cycle or to operate on a rolling basis. Without a system in place to do regular compliance checks, it is our experience that these entitlements are often inadvertently overlooked and not calculated at all, leading to significant underpayment issues.

- Difficulties arising from the nature of work in particular industries that awards do not account for, with the Yellow Canary payroll service also commenting that:

The General Retail Industry Award says that a meal allowance is owed if 24 hours’ notice of overtime is not given. However, most payroll or time and attendance systems aren’t built to capture and record whether or not notice was given, which makes it difficult to then know whether the allowance was paid correctly, or at all.

Larger retailers with multiple stores may require employees work two shifts in a day. They might also require employees to perform stocktake, ask them to come back in (recall), or perhaps an employee just didn’t clock in / out with a break, and it was recorded as two shifts. Without manual intervention, many time and attendance systems will not easily deal with these scenarios, which can often result in payment errors.¹⁸

¹⁴ Food and Beverage Attendants Grades 1 and 2 under the Restaurant Industry Award 2020.

¹⁵ Hospitality Industry (General) Award 2020, Food and Beverage attendant grade 3

¹⁶ Journalists Published Media Award 2020

¹⁷ <https://www.yellowcanary.com.au/resources/blogs/retail-payroll-compliance-issues>

¹⁸ <https://www.yellowcanary.com.au/resources/blogs/retail-payroll-compliance-issues>

2.3 Awards should support bargaining

42. Enterprise agreements should be easy to make and approve, lifting productivity, supporting innovation, and delivering benefits for employers and employees. Awards should support agreement making and collaboration in workplaces to drive positive outcomes.
43. Awards provide the minimum standards for agreement making and are critical to ensuring employees are better off for entering into agreements through the Better Off Overall Test (BOOT) in the FW Act, which compares proposed agreements on an overall basis to modern awards.
44. There appear considerable opportunities to recast awards, or parts of awards to perform the function of agreement comparison more clearly and reliably, in a way that better encourages agreement making and promotes confidence to bargain and collaborate in workplaces.
45. The BCA worked to secure positive reforms to the application of the BOOT in the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022, which emphasise the overall nature of the test. This will support further enterprise bargaining in line with the government's commitment to increase the level of bargaining.
46. Realising the benefits of these changes to the application of the BOOT however still relies on a full understanding of the relevant award on which the agreement is based.
47. Award requirements are however too often unclear and overcomplicated, which has flow-on implications for making agreements and for access to the higher pay and job security that bargaining should deliver.
48. Award complexity, and lack of useability continues to make bargaining difficult and less attractive to many workplaces. If awards are not properly understood, there is less likelihood of informed engagement with how they could be customised through bargaining.
49. This is evidenced by the Commission identifying common defects in the BOOT.¹⁹ Proposed agreements often omit key detail from awards regarding overtime, minimum engagement periods, allowances, penalties, payment of TOIL (time off in lieu) on termination, cashing out annual leave safeguards, and rates of pay for juniors, apprentices or those employees operating under the Supported Wage System. Some of these may be errors of omission, but others arise from misunderstanding award obligations and their application.

2.4 Awards contain outdated and misdirected terms

50. Awards still contain outdated and obsolete concepts, with many awards regulating work with equipment and processes that no longer exist. As an example, the Manufacturing Award regulates the making and repair of horse drawn carriages and motorcycle sidecars. This is indicative of an award system stuck in a different era. It also highlights a system mired in undue specificity and prescription.
51. Employers also experience a disconnect between customer, community, and market expectations and the terms of modern awards. The driving imperatives on businesses to respond to the needs of customers are extremely difficult to achieve and be productive, when the ways of working are constrained in processes from another era.
52. Awards also need to be more future focussed. Awards should ensure changes in how we work, including with new technologies, lead to safer, higher paying and more satisfying jobs. Awards have previously played a role in ensuring changes in how Australians work have been positive and that should again be the goal for future award regulation.

¹⁹ <https://www.fwc.gov.au/better-overall-test-common-defects-issues>

2.5 Awards cover the wrong cohorts of employees

53. As outlined in Section 3, awards could be better focused on those who need the protection with a more detailed regulation of minimum terms and conditions, particularly the lower paid.
54. Presently, due to imprecision, awards draw in the employment of managers and professionals receiving executive remuneration unrelated to award employment.

2.6 There are too many modern awards

55. Australia prescribes 121 separate modern awards, regulating well over 3,800²⁰ separate classification rates and hundreds of thousands of individual minimum wages. It is not clear that this is necessary or appropriate for a workforce of just over 14 million workers.
56. Key questions that need to be addressed include:
- What Australia is gaining from this level of prescription, and from the breadth and specificity of prescription across 121 separate modern awards?
 - How award numbers and structures could change to better set minimum standards, and better support collective bargaining and compliance?
57. There is also inconsistency in award proliferation and specificity. In some industries there is a single modern award (such as retail, or banking and finance and insurance) but in others there are multiple awards (such as construction, road transport and manufacturing). Some areas are further progressed towards a generic and more efficiently organised safety net than others.

2.7 Awards prescribe too many distinct minimum wages

58. The seven awards highlighted in this this Review contain:
- | | |
|---|--------------------|
| ■ Children's Services Award | 40 classifications |
| ■ Clerks – Private Sector Award | 10 classifications |
| ■ Fast Food Industry Award | 4 classifications |
| ■ General Retail Industry Award | 8 classifications |
| ■ Hospitality Industry (General) Award | 61 classifications |
| ■ Restaurant Industry Award | 24 classifications |
| ■ Social, Community, Home Care and Disability Services Industry Award | 79 classifications |
59. The Australian award system prescribes considerably more than 3,872 separate minimum rates.
60. As an example, the eight classification General Retail Industry Award (105 pages) gives rise to a 29 page Pay Guide from the FWO²¹. This guide effectively sets out more than 1,400 separate minimum rates of pay, applicable to different classifications, modes of employment, ages and training arrangements, and hours or days worked.

²⁰ 121 modern awards x an average 32 classifications per award = 3,872 classifications

²¹ 27 pages of pay rates.

2.8 Awards prescribe too much detail

61. Awards remain far more detailed and prescriptive of minimum terms and conditions of employment than they need to be for 21st century workplaces. In doing so, they somewhat paradoxically create additional complexity and confusion for those seeking to comply with them.
62. Problems include:
- Replicated minimum wage structures for parts of industries or de facto awards within awards.
 - Substantive obligations that are conditional on subjective (and often complex or unclear) assessments, such as those delineating different award classifications and minimum wages.
 - Overly legalistic construction and language.
 - Awards prescribing minimum requirements in variable terms, or with inconsistent wording, that are essentially standard across awards, and that could be more generically regulated.
 - Awards prescribing procedures, processes and steps, and exchanges of paperwork rather than focusing on the substance of rights and obligations such as requirements that can be reduced to 'must', 'must not', 'when', or 'how much'.
 - Confusing cross referencing to the NES.

3. Principles for delivering a 21st century award system

63. The BCA recommends the following guiding principles to the Commission for making modern awards easier to use, addressing the problems outlined in Section 2, and ensuring modern awards are more effective and appropriate to the work and workplaces of the 21st century.

3.1 Clearer approaches, expectations, and outcomes

64. All parts of Australia's workplace relations system, including awards, should ensure work and workplaces can be agile, flexible, and efficient so more Australians can be better matched to higher-paying jobs, companies can adapt and innovate to remain globally competitive, and that workers are protected. Further reform of awards is required based on the following priorities and approaches.

Genuinely modernise and improve awards

65. Australia's rules for employment should deliver clear, effective, contemporary employment regulation of minimum standards constituted by both further reformed and modernised awards, underpinned by the NES.
66. Australia should continue to utilise awards to set minimum terms of employment but ensure awards can better play the role we need them to play. Awards need to be further modernised, properly structured, and strategically positioned within the wider workplace relations system as it evolves, with greater clarity on the role they are to play.
67. This includes being simple and clear, to provide the foundation for collaborative enterprise bargaining which supports the growth of business with increasing benefits for workers through improved bargaining outcomes.

Develop a model for substantive, ambitious award reform

68. Further award reform needs to be ambitious, and able to deliver significant improvements consistent with the vision and priorities set out in this submission and the BCA's Seize the Moment policy blueprint.
69. Varying awards is difficult, costly and time consuming. Any further changes must improve awards, be worth doing, and worth the investment demanded from all concerned.
70. Tinkering, rearranging, or further plain language redrafting will not be sufficient. Awards are going to need to change substantially to perform the role Australia asks of them. This means simplifying the regulation of work, helping drive productivity improvements and better delivering on the expectations of customers and consumers, whilst providing effective, enforceable, and comprehensible minimum standards.

Ensure further award reform is driven by a clear vision and goals

71. Critical to the confidence of the workplace relations community to positively contribute to further changes to awards will be having a clear vision for their future role, functions, and roadmaps for reform.
72. The BCA's workplace relations framework, in the Seize the Moment blueprint, provides a vision for future reform and should guide future changes to awards, and the broader evolution of workplace relations regulation.

Ensure awards are better geared to current and future work

73. The future of work will be driven by digitisation and technology. To maximise these opportunities, we need an environment that supports new industries and jobs, taps into the world's supply chains, and produces value-added products that command premium prices.²²
74. Changes to work and the future of work also need to drive changes to awards. Awards will need to allow for innovation and flexibility, so they can be easily adapted. As occurred through the evolution of work, new technology should make workplaces safer and more productive, which benefits the workforce.

3.2 Reducing award numbers and reforming award structures

Identify options for the further consolidation of modern awards

75. After 13 years of modern awards and 116 years after the Harvester Judgement and the proliferation of the awards it inspired, there should be an independent review and report on options for significant further consolidation in the overall number of modern awards.

■ The award system must be substantially simplified, with fewer instruments prescribing fewer separate minimum wage rates, and have far simpler application to hours worked. Awards should be based on broader, more generic industry sectors.

BCA, Seize the Moment, 2023 ■

76. There appear to be significant opportunities, including reviewing the proliferation of separate modern awards in similar areas. Further consolidation may be warranted in areas such as manufacturing, building and construction, and road transport.
77. The BCA is not advancing a particular organising principle or model for further award reform or suggesting a specific target number for awards. However, options for the future organisation of modern awards might include:
- A model broadly derived from the Australian and New Zealand Standard Industrial Classification (ANZSIC) framework: Moving towards awards broadly structured around the 19 ANZSIC divisions²³, or at the subdivisional level of ANZSIC where more appropriate. This might see a single manufacturing award, a single construction industry award, a single wholesale award, and a single hospitality award for pubs, clubs, and restaurants.
 - Some modern awards already reflect such a consolidated award structure, with single awards already in place in banking and finance, and insurance, and retail. However, the previous making and reviewing of modern awards has left substantial areas for further award consolidation.
 - Even within such a broad approach there would need to be exceptions or scope for differing approaches. ANZSIC Division I is Transport, Postal and Warehousing, which are fundamentally different activities industrially, and even within "transport" there are fundamental differences between road, rail, air, and water transport. This may be an area in which lower levels of the ANZSIC framework could guide award future structures, subject to further consideration and industry input.

²² BCA (2023) Seize the Moment, p.173

²³ [Australian and New Zealand Standard Industrial Classification](#)

- Clustering existing modern awards together: Rather than starting with a structure like ANZSIC and using it to reconsider existing awards, families or clusters of existing modern awards might be drawn together and considered for combining into a more consolidated award structure.

Harness available tools to facilitate transitions to more consolidated award terms

78. Reflecting on the 2-year review and 4-year review of modern awards, the BCA does not recommend taking the same path. Any further award reform should be delivered in a single stage without any pre-programmed or automatic re-examination or re-opening of all awards following reform.
79. There should however be:
- Scope for increased standardisation and consolidation in modern awards to be delivered progressively and phased in where necessary.
 - Scope for specific matters to be addressed on application after consolidation, where allowable and consistent with revised objects and parameters for awards.
 - Tools to support phased consolidation of award terms and conditions.
80. There should be consideration of the tools the Commission has (or could be granted through legislation) to facilitate transitions into genuinely consolidated awards, and to ensure the interests of employees and employers are appropriately protected. Such transitional tools might include:
- Preservation or savings clauses, which ensure terms and conditions for existing employees do not go backwards as awards standardise and newly hired employees commence on more consolidated or standard terms and conditions.
 - Minimum wage tables that progressively phase in changes to consolidate award classifications and rates.
 - Using streams or parts of modern awards to differently regulate legacy coverage of different modern awards. However, care should be taken to ensure that this does not entrench de facto separate awards within nominally consolidated award structures, as presently occurs in some awards. Any streams or separate parts in awards should be transitional, and there should be an end point for integration into consistent application of terms across modern awards.
81. Where there is substantial agreement coverage and less direct application of modern awards or parts of them, there may be greater comfort and confidence (and potentially more speed) in standardising award obligations. This seems particularly the case in areas in which medium earnings and employee skills are higher, or further in excess of award rates.

Clarify which award applies

82. An Award Coverage Order, which is either open-ended or operates for a prescribed period (and remains in place unless replaced or varied), could be made available to clarify which modern award applies to a particular workplace.
83. Such orders would be declaratory, making clear which award should be applied to set terms and conditions, and for the application of the BOOT. Such orders might usefully be searchable online.
84. Consideration should also be given to the capacity to seek binding declarations of which classifications apply to particular work and even the application of obligations to particular rosters.
85. No employer should be obliged to obtain such an order, and it is not proposed that there be any return to respondents' lists in awards.

3.3 Better focussing award regulation

86. Consideration should be given to better focus modern award regulation on the lower paid through mechanisms such as:

- Setting an income threshold for the application of awards.
- All modern awards containing exemption clauses, which provide that where an employee earns a prescribed amount in excess of an award, or a prescribed multiple of the highest rate in an award, some, or all the terms of the award do not apply.
- Removing higher earning professions and occupations from award coverage.

3.4 Clearer, simpler, better understood awards

87. Clarity and comprehensibility can be significantly improved. Options for more user-friendly drafting and expression may usefully focus on:

- Clearer and more reliable delineations between obligations, including more distinct and well-defined delineations between classifications, and scenarios in which specific obligations do and do not apply.
- Simplifying award terms to a standard of community comprehensibility, not what workplace relations experts may perceive as simple and comprehensible.
- Reducing the use of overly legalistic language. For example, replacing 'coverage' with 'Who does this award apply to?', and then 'This award applies to...' or 'This award does not apply to...'.
■ Including worked examples of specific scenarios in awards to assist employers and employees in understanding rights and obligations, including details of how the examples were calculated (such as showing the calculations in footnotes, or through an online link).
- Removing repeated references to the NES in favour of a standard clause in all awards such as 'the following matters are regulated by the National Employment Standards in the Fair Work Act' and then including a list outlining what the NES do and where to find further information (which may be by way of hyperlinks to online information).
- Using a simple Q&A format for awards or as schedules to awards.
- Including tables to set out employment obligations where this would be clearer and more consistent than the existing text-based approaches.
- Providing alphabetical indexes at the end of awards using the plain language Australians use every day in workplaces. This would be in addition to the Table of Contents and ordering at the start of modern awards which is currently more Commission driven than user focussed.
- Using hyperlinks to Commission or FWO maintained websites to explain concepts, and to link to further detail and guidance materials.

Reform Part 2-3 of the FW Act

88. Part 2-3 of the FW Act should provide clearer lists of concepts that must or must not be included in awards, and ensure these concepts are given their ordinary industrial meaning in determining award content and structures. Consideration should be given to whether the allowable award matters mechanism that preceded the current modern award system was clearer and more effective in directing award making and variation than the current Division 3 of Part 2-3 of the FW Act.

89. There appears an opportunity to minimise the grey areas of what “may” be included in awards.²⁴ An approach based solely on what must and must not be in awards may be much clearer and more effective in refining awards to better deliver for employees and employers as work and workplaces change.

Broad band wages in awards

90. Modern awards should prescribe fewer minimum wage rates, which would apply generically to all employment covered by the award. Some modern awards apply separate classifications and minimum wage rates to parts or streams of an industry, derived from differing pre-modernised awards. This means there are effectively awards within awards.
91. The Miscellaneous Award’s 4 level classification structure is a model to potentially work towards for more industries.²⁵ Consideration should be given to the basis on which any modern award should require the setting of minimum wages beyond:
- An induction rate.
 - A base rate.
 - A trades qualified rate or equivalent.
 - A rate for employees with advanced trade qualifications or higher, or equivalent.
92. In the seven modern awards that are the focus of this review, we see awards with 40, 60 and sometimes 80 separate classifications. That is a sign of partial or incomplete consolidation and industries that remain dependent on centralism and prescriptiveness.
93. Award minimum wage structures could be made simpler by:
- Removing separate streams from awards in favour of single stream application and mainstreaming award rates into simple, concise rate tables that apply to all employment under a modern award, and standard conditions, and terms where appropriate.
 - Potentially reembaring on broad banding to remove small differences between rates and to combine parallel occupations and streams in awards together, either in a single step or progressively through phasing in where necessary.
 - Consolidating classifications prescribing narrow differences in minimum wages into single broad banded classifications. A measure of such consolidation was achieved in the 1980s and 1990s, and this might usefully be reviewed and re-embarked upon as a measure for award wage consolidation that considers the interests of both employees and employers.
 - Focussing award protections on lower paid employment, through a high-income threshold for award coverage and including exemptions clauses in all modern awards.

Flexible and adaptable options where appropriate

94. Awards should better reflect modern ways of working and employee expectations, particularly employees' desire for remote and flexible working. Consideration could be given to options for:
- Work from home arrangements.

²⁴ Part 2-3, Div 3, Subdiv B of the Fair Work Act 2009.

²⁵ However, the BCA does not support extensions to the scope of the Miscellaneous Award. If a job is not obviously covered by another relevant occupational or industry award, it should be award-free. The changes made to the coverage of the Miscellaneous Award in 2020 resulted in many previously award free roles becoming subject to award regulation. These changes were instigated by the FWC and not based on any employer or employee request for change. In circumstances where we have a national minimum wage and National Employment Standards in place, it is difficult to understand why a “miscellaneous” award is even necessary as it is a safety net upon a safety net that adds complexity and risk for employers and creates confusion for employees.

- Making agreed day-to-day adjustments to hours of work and rosters. This could allow overtime to be calculated weekly instead of daily (for example where an employee stays back on Monday for 2 hours, but it is agreed that on Friday they can leave 2 hours early to spend an afternoon with children). The employer would not be required to pay overtime (plus an overtime meal allowance) for the additional hours on a Monday in such a scenario.
95. Making modern awards easier to use should extend to providing annualised salary options as standard.
96. Annualised salaries can be a good option for both simplicity and for an employee’s ability to secure finance, such as mortgages and personal loans. However, there is no simplicity in the way annualised salaries must be applied to award covered employees as they are still inextricably linked to hour-by-hour payments and entitlements (even though salaried people drawn into some awards do not see themselves as hour-by-hour employees). Options should be explored to unlock simple, award compliant annual salaries that do not require extensive testing or benchmarking against hourly award rates.

Allow award specificity where necessary

97. Making modern awards easier to use may see both the addition and removal of text from existing awards. Sometimes words need to be added to make concepts clearer and more precise for users. This may include adding worked examples or tables of loaded rates, annualised salaries, indicative or example rosters, or specific guidance on how the BOOT or facilitation should be applied.
98. Some industry specificity in awards is appropriate and well executed. This is particularly the case for terms of employment, which should in time become the primary industry specific award regulation (with conditions, process and consultation matters increasingly standardised).
99. A guiding principle could be that awards should only regulate industry specific conditions of employment:
- where necessary on an exceptional basis,
 - where matters cannot be regulated in standard terms,
 - where applying standard award terms would be inconsistent with revised objectives for awards, contrary to the interests of employers and employees,
 - where it would not support bargaining or compliance.

3.5 Standardising award wording

100. Consideration needs to be given to where awards need to vary on an industry specific basis, and where they can be standardised or expressed in identical terms.
101. More standard award regulation can better support compliance, by being able to be explained and promoted to the public more clearly and consistently, as standard rules for employment in Australia. Reducing variability of requirements would seem to offer scope for improved compliance and improved understanding of rights and responsibilities.
102. Broadly, it appears awards are more likely to need to vary with respect to the terms of employment (such as wages, allowances, and hours of work) on an industry-by-industry basis, and that conditions of employment offer fertile ground for more standardised award wording.
103. Prior to modern awards, test cases handed down award terms that were overwhelmingly applied as standard wording across the award system. Such standardisation of award regulation of conditions of employment (and more consistent expression of terms of employment where appropriate) could significantly improve awards for the future.
104. Targets for future standardisation of wording may include award clauses on:

- Flexibility and facilitation, types of employment, training and supported wages, payment of wages and payment on termination of employment.
 - Leave loading, and potentially all leave matters in awards (noting the separate proposal for NES matters to come out of awards unless additional award regulation is necessary).
 - Overtime, time off in lieu, minimum engagements, minimum breaks between shifts and shift work arrangements and allowances.
 - Consultation, change and dispute settlement, many of which were previously standard in awards following AIRC²⁶ test cases (as was annual leave loading).
105. There should be either no scope for any award to depart from standard wording of such entitlements, or rules that ensure award specific customisation is available only in exceptional circumstances and where necessary.
106. Consideration would also need to be given to:
- Standard wording of consultation, representation, and dispute settlement clauses.
 - Standardising scope for the making of Individual Flexibility Arrangements (IFAs) under awards, and identically wording IFA clauses and the matters that can be addressed in IFAs.

3.6 Clearer delineation between awards and the NES

107. There may be an opportunity for clearer delineation in what is regulated in awards and what is regulated through the NES. Input should be sought on whether modern awards should be able to include terms that affect the application of the NES, or whether a stricter separation is needed between award and statutory regulation. This means potentially reviewing s 55 of the FW Act, and the various sections of the NES that allow modern awards to do particular things in relation to them.
108. An exception might be where awards provide for additional entitlements above the NES, but potentially not where award clauses do no more than prescribe processes or conditionality for application of the NES.

3.7 Further approaches and considerations

Start by reforming the most used modern awards, plus key BOOT comparators

109. Future award reform could proceed from a lead group of awards, which can be varied to establish principles and approaches to guide the modernisation of remaining awards.
110. A pilot or lead group of awards could be based on:
- The most applied modern awards, such as the seven awards included in this review.
 - Alternatively, a lead cluster or family of awards (such as manufacturing, or hospitality awards).

Require information from the FWO to underpin award reform

111. If awards are going to be made easier to use and compliance improved, the Commission will need to understand where awards are not being easily or reliably used, and where problems arise. As the BCA indicates in the Seize the Moment reform blueprint:

Outdated restrictions and concepts of work should be removed (from awards), enabling greater flexibility to support new ways of working. A good starting point would be to ascertain where most payment errors are happening due to the complexity of the system. This would directly benefit employees and employers by

²⁶ The former Australian Industrial Relations Commission

ensuring more accurate payments and minimising the risk of inadvertent under and over-payments by business.²⁷

112. The FWO is uniquely positioned to provide information on where modern awards are not being understood and applied as intended. The FWO should provide information to assist and inform further modernisation of awards, including heat map style information on which awards, and which provisions of awards, are giving rise to the most queries and compliance complaints. This reflects the importance of better supporting compliance in improving the quality, clarity, and structure of awards.

Test proposed modern awards with employers and employees

113. Focus groups should test whether recast award terms are comprehensible to those who work directly on awards and those who employ them. This might see a process in which focus groups are convened:
- Early in the award reform process, to guide the redesign and rewording of awards, and priorities for improving the clarity and wording of award obligations.
 - At the end of the process, to ‘road test’ proposed new or significantly varied awards.
 - With an emphasis on testing the comprehensibility of awards for employees and employers for whom English is not a first language, and with standard rather than advanced levels of reading and comprehension.

Issue exposure drafts and invite feedback

114. The Commission already posts drafts and provides opportunities for public comment and engagement, particularly on major or multi-award matters. Timetabling for further reviewing modern awards should include an opportunity for a final stage of public input on any proposed modernised award, by way of a final exposure draft and a standard period for any comment or final submissions.

Fund further award modernisation

115. Government grants should support union and employer engagement with further award reform.

²⁷ BCA (2023) Seize the Moment, p.178

4. Issue an exposure draft of the final report

116. The Commission should issue an exposure draft of its proposed report to Government in this Review and invite a final round of input on proposed recommendations. If the Review Timetable²⁸ does not allow for an exposure draft, it should be revised, or an extension should be sought from Government.

²⁸ [\[2023\] FWCFB 179](#)

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