

ACCI Submission

Modern Awards Review 2023-24: Job Security

Reply Submission

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Introduction

1. This Reply Submission in the Job Security stream of the Modern Awards Review 2023-24 (**Review**) follows ACCI's initial submission of 5 February 2024 (**Initial Submission**).
2. With resources stretched because of engagement in various Fair Work Commission (**Commission**) matters and the recent passage of wide-ranging workplace relations laws, ACCI has not had the opportunity to consider all submissions in detail and intends to make more specific submissions orally during Conference.
3. Instead of replying directly to proposals advanced by union representatives, this submission will address some general observations arising from these submissions, particularly by the Australian Council of Trade Unions in its submission of 5 February 2024 (**ACTU Submission**). These matters give rise to threshold questions that ACCI respectfully submits must be dealt with before further consideration can be given to specific award variation proposals.

Reply

4. In addition to the ACTU submission, the following employee representative organisations have made submissions in this matter:
- a. United Workers Union (**UWU**), which raises concerns with some modern award clauses but does not propose specific variations;
 - b. Queensland Council of Unions (**QCU**), which relies substantially on the ACTU Submission, but does not propose specific award variations;¹
 - c. Australian Nursing and Midwifery Federation (**ANMF**), which relies on the ACTU Submission and advances some additional variation proposals relating to the *Nurses Award 2020*;²
 - d. National Tertiary Education Industrial Union (**NTEU**), which supports the ACTU Submission and makes some specific proposals to the *Higher Education Industry – Academic Award 2020* and the *Higher Education Industry – General Staff Award 2020*;³
 - e. Mining and Energy Union (**MEU**), which simply supports the ACTU Submission;⁴
 - f. CFMMEU (**Manufacturing Division**), which puts forward proposals with specific relation to the following modern awards, *Dry Cleaning and Laundry Industry Award 2020*, *Timber Industry Award 2020*, and *Textile Clothing and Footwear Industry Award 2020*;⁵
 - g. The Australian Services Union (**ASU**), which adopts the submissions of the ACTU and puts forward proposals with a particular focus on rostering arrangements;⁶
 - h. The Australian Manufacturing Workers Union (**AMWU**), which endorses the proposals put forth by the ACTU and argues that certain provisions from the *Manufacturing and Associated Industries and Occupations Award 2020* and the *Textile, Clothing, Footwear and Associated Industries Award 2020* should be extended to all awards;⁷ and
 - i. The Shop Distributive and Allied Employees' Association (**SDA**), which relies on the ACTU submission and includes considerations of specific provisions in the *General Retail Industry Award* and the *Fast Food Industry Award*.⁸

¹ Modern Awards Review: Job Security Stream, Queensland Council of Unions Submission, page 3 at [4].

² Modern Awards Review: Job Security Stream, Australian Nursing and Midwifery Federation Submission, page 3 at [4].

³ Modern Awards Review: Job Security Stream, National Tertiary Education Industrial Union Submission, page 2 at [2] and page 3 at [10].

⁴ Modern Awards Review: Job Security Stream, Mining and Energy Union Submission at [2].

⁵ Modern Awards Review: Job Security Stream, CFMMEU (Manufacturing Division) Submission, page 5 at [13].

⁶ Modern Awards Review: Job Security Stream, Australian Services Union Submission, page 2 at [4].

⁷ Modern Awards Review: Job Security Stream, Australian Manufacturing Workers Union Submission, pages 4 at [5], 6 at [11], and 9 at [21].

⁸ Modern Awards Review: Job Security Stream, Shop Distributive and Allied Employees' Association Submission, page 6 at [18].

5. As a peak employer organisation, ACCI will respond in these proceedings primarily to those submissions put forward by the ACTU, which raises alleged issues across multiple awards, as opposed to industry specific concerns. That said, ACCI respectfully submits that there are common deficiencies across all the submissions put forward by union organisations that are worth highlighting at the outset.
6. First, while general issues have been advanced by all union organisation not all advance specific award variation proposals. In the interests of time and the limited resources of parties and the Commission, ACCI respectfully submits that discussion at the listed conferences should be limited to oral submissions regarding specific award variation proposals, rather than general issues where no specific solution is being advanced. The Commission can still make use of written submissions to inform its final report, to the extent it wishes to reflect those general concerns.
7. Second, unlike submissions advanced by many employer organisations,⁹ submissions advanced by union organisations do not deal with the proper construction of the relevant modern award objective, being s 134(1) (aa) of the Fair Work Act (**FW Act**), “the need to improve access to secure work across the economy”.
8. As highlighted in the Discussion Paper, the concept of “secure work” and “job security” have no settled meaning¹⁰. The Commission is required to take into account the updated objectives when exercising its modern award powers¹¹, which makes the matter of the proper construction of these new objectives a key threshold question.
9. Furthermore, no serious attempt has been made by union parties to link the updated, and to-date unsettled, objectives to specific award variation proposals. In this context it is hard for employer organisations to adequately respond to such ambit claims.
10. In most cases the proposals and submissions advanced by the ACTU, and their affiliates, are a re-prosecution of proposals and arguments raised in past decisions. For instance, the ACTU re-litigates changes to consultation clauses which have long been settled at law, using the same arguments¹².
11. While the Commission is not bound by principles of stare decisis, it will generally follow previous Full Bench decisions “in the absence of cogent reasons for not doing so” “as a matter of policy and sound administration”.¹³ While updated modern award objectives may of course be a cogent reason for departing from precedent, the applicant must demonstrate how those updated objectives justify the departure, rather than just prosecuting the same arguments and hoping for a different outcome.

⁹ Modern Awards Review: Job Security Stream, Australian Chamber of Commerce and Industry Submission, pages 5-10 at [7]-[25]; Modern Awards Review: Job Security Stream, Australian Business Industrial/Business NSW Submission, pages 23-24 at [66]-[77]; Modern Awards Review: Job Security Stream, Australian Industry Group, pages 10-20 at [24]-[58].

¹⁰ Modern Awards Review: Job Security Stream, Discussion Paper, Fair Work Commission, page 22 at [53].

¹¹ Ibid, page 10 at [13].

¹² 1984 Termination, Change and Redundancy Case (C Nos 3690, 3735 of 1981; 127 of 1983) (TCR 1), and 505/84 MD Print F7262 [incorporating Mis 505/84 MD Print F7262 [1984] AIRC 133; (14 December 1984) (TCR 2).

¹³ Cetin v Ripon Pty Ltd (2003) 127 IR 205, 214 [48] (Ross VP, Duncan SDP, Roberts C).

12. ACCI respectfully submits that before further consideration is given to those specific variations proposed by union representatives, further work be done by those parties to advance submissions on the proper construction of the updated objectives, and detail be provided on how that interpretation links with the proposed variations.
13. For instance, at recommendation 3 of the ACTU Submission, unions argue for an increase to casual loadings, the provision of additional or improved forms of paid leave and an undefined adjustment of other conditions relevant to job security. However, in its submission the ACTU has failed to explain how an increase in casual loading will satisfy the updated award objective. The rate of the casual loading does not go to the issue of predictability or regularity of work, but is rather an ambit claim for increased entitlements for casual employees.
14. As ACCI has previously submitted, at [18] of its Initial Submission, the updated objectives should not be read to support the proposition that 'secure work' supports a review of wages and of conditions of employment unrelated to modern awards terms which promote regularity and predictability. Improving access to 'secure work' does not include an assessment of wage rates or modern award terms which do not go to regularity or predictability.
15. For completeness, ACCI's submission on the proper construction of the updated modern awards objective is found at [14] – [19] of its Initial Submission. In summary, ACCI submits that when considering whether the terms of modern awards appropriately reflect the updated objectives, the Commission should consider whether they improve access to secure work, taking into account:
 - (1) whether the employee has a choice to enter into work which promotes regularity and predictability; and
 - (2) the effect of general economic circumstances upon the capacity of employers to employ, or continue to employ, workers, especially on a permanent rather than casual basis.
16. The effect of general economic circumstances upon the capacity of employers to employ, or continue to employ, workers, is clearly relevant to whether an employee has a choice to enter into secure work. If economic circumstances are such that the employer cannot offer employees work, then the employee will be deprived of this choice.
17. It is through this lens that the Commission should consider whether a modern award term is consistent with the updated objectives. It should avoid any interpretation of the updated objectives which, for example, may deprive employees of a choice to enter into non-permanent forms of work (casual, fixed term etc employment) and must take into account the economic impact on the employer, and relatedly, the capacity for that employer to offer work.

18. Even if the Commission is minded to reject the proposition that the updated modern awards objective includes a consideration of the effect of general economic circumstances upon the capacity of employers to employ, or continue to employ, workers, especially on a permanent rather than a casual basis, this consideration is still relevant in the Commission's assessment of the suitability of any proposed variation, noting that s 134(1) (modern awards objective), includes (f) "the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden".
19. Third, notwithstanding the failure of union organisations to advance submissions regarding the proper construction of the updated objectives, ACCI notes that before the Commission can consider any specific proposals for variations to modern award terms, it must have regard to all other section 134 matters, not just s 134(1) (aa), which is the subject of this Review.¹⁴ No particular primacy is attached to any individual s 134 consideration.¹⁵
20. Accordingly, ACCI respectfully submits that the Commission cannot recommend the advancement of specific modern award variations in its report until parties have an opportunity to make submissions on all other section 134 matters which may be relevant. In the time allocated for Conferences in this matter, it won't be possible for ACCI and other employer organisations to put forward reply submissions that adequately deal with all relevant modern awards objectives, and this should be borne in mind by the Commission while it is finalising its report.
21. The primary purpose of this stream of the Review should be to provide greater certainty about the proper construction of the updated objectives and their potential impact on modern award terms, and only if that matter is settled should attention be turned to specific award variations, especially where consensus is established.
22. Fourth, the ACTU Submissions, and others, call for legislative change and for more modern awards to be included as part of this stream of the Review. ACCI does not intend to respond to such submissions, as they are clearly outside the scope of this Review.
23. In summary, ACCI respectfully submits that:
 - a. discussion at the listed conferences should be limited to oral submissions regarding specific award variation proposals, rather than general issues where no specific solution is being advanced;
 - b. before further consideration is given to those specific variations proposed by union representatives that further work be done by those parties to advance submissions on the proper construction of the updated objectives, and detail be provided on how that interpretation links with the proposed variations;

¹⁴ *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retailers Association v Fair Work Commission* (2024) 225 154 at [56]

¹⁵ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC at [48]

- c. the Commission cannot recommend the advancement of specific modern award variations in its report until parties have an opportunity to make submissions on all other section 134 matters, which may be relevant. In the time allocated for Conferences in this matter, it won't be possible for ACCI and other employer organisations to put forward reply submissions that adequately deal with all relevant modern awards objectives, and this should be borne in mind by the Commission while it is finalising its report; and
- d. submissions proposing to expand the scope of the Review and calling for legislative change are clearly out of scope of this Review, and should not be considered as part of this process.



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