

Modern Awards Review 2023-24 – Making Awards Easier to Use

Submission in Response – Health Services Union

19 February 2024



Introduction

1. This is a submission in response made in relation to stream 4 of the Modern Awards Review 2023-24 – making awards easier to use. The submission is made pursuant to the timetable set in the Full Bench’s Statement of 4 October 2023.¹
2. Of the seven awards the subject of this stream of the Review, the Health Services Union (HSU) has an interest in the *Social, Community, Home Care and Disability Services Industry Award 2010* (SCHADS Award). This submission responds to submissions and proposals made in relation to the SCHADS Award by interested parties on 22 December 2023.
3. While this submission has been prepared by HSU National, it is made on behalf of our branches and members Australia-wide.²

Response to proposals

Proposals which reduce employee entitlements

4. Pursuant to the President’s Statement of 15 September 2023, interested parties were invited to advance proposals to make the nominated awards easier to use while not reducing entitlements for award-covered employees.³
5. The HSU has had the opportunity to review the submission of the Australian Council of Trade Unions (ACTU). The HSU adopts the ACTU’s submission and shares the concerns raised therein that most of the proposals made in this stream advocate for a reduction of entitlements or otherwise do not go to making the awards easier to use. We share the view that such proposals should not be entertained in this stream of the Review.
6. For the brief reasons that follow, the HSU is of the view that – with the exception of the matters set out in the following section of this submission – the balance of the proposals made in relation to the SCHADS Award fall outside the scope of this review and ought not be entertained in it:

Australian Business Industrial/Business NSW proposals:

- a) Proposal to vary cl 10.3(e) to allow agreed hours for part time employees to be effectively varied with an ongoing series of text messages. This would remove a safeguard around agreed hours for part time workers, which is particularly important for SCHADS Award workers who are already uniquely susceptible to pressure from their employers because of their precarious working arrangements and commitment to their work;
- b) Proposal to vary cl 13 to make classification determinations dependent on what an employer may or may not explicitly require of an employee. There is already a well-established principal purpose test. The ABI proposal would introduce subjectivity, and would be particularly

¹ *Modern Awards Review 2023-24* [2023] FWCFB 179.

² HSU National is the trading name for the Health Services Union, a trade union registered under the *Fair Work (Registered Organisations) Act 2009*. The HSU has registered branches for New South Wales/Queensland/Australian Capital Territory; Victoria (4); Tasmania; South Australia/Northern Territory; and Western Australia.

³ <https://www.fwc.gov.au/documents/resources/presidents-statement-modern-awards-review-2023-24-2023-09-15.pdf>.

problematic for SCHADS Award workers who are subject to a range of regulatory requirements in the performance of their work (not just the express requirements of their employer).

Australian Chamber of Commerce and Industry:

- a) Proposal to vary cl 23 – Superannuation. A review of award superannuation clauses has just been completed, in which the FWC took into account the need to ensure a simple, easy to understand, stable and sustainable modern award system. It is not appropriate for ACCI to be allowed to use this stream of the Review to effectively relitigate the position it took in that process;
- b) Proposal to vary cl 28.2 to vary arrangements relating to time off in lieu of overtime would constitute a reduction in employee entitlements, particularly the proposal to remove the reference to s 65 and to delay payment of overtime;
- c) Proposal to vary clauses 31.6-31.8 with respect to excessive leave accruals would constitute a reduction in employee entitlements, particularly the proposal to remove the 12-month outer limit and to disregard other planned leave when maintaining the 6 weeks in reserve;
- d) Proposal to amalgamate clauses 8 and 8A re consultation. This would introduce threshold tests which do not currently exist with respect to consultation over roster changes, replace the need to consult with an invitation to discuss, allow employers to make changes to an employee’s roster prior to consulting them, and would therefore constitute a reduction in entitlements for employees;
- e) Proposals to vary cl 7 to vary the test for individual flexibility agreements (**IFAs**) to replace the better off overall requirement with a no disadvantage test would remove an important safeguard for employees.

Australian Industry Group (AiG):

- a) Proposal to vary cl 10.5 to allow minimum engagements to be reduced. The relevant minimum engagements were varied during the 4 yearly review. They represent an important safeguard for SCHADS Award employees who the FWC has recognised are uniquely vulnerable to pressure from their employers due to their precarious working arrangements and commitment to their work. The proposed variation would undermine an important employee safeguard and should not be entertained in this Review;
- b) Proposal to vary cl 24 to allow pay averaging and for payments to be made on a 4-weekly or monthly basis would be a reduction in entitlements for low-paid SCHADS Award workers who live week to week and tend to have little in the way of savings. The HSU is also opposed to the proposal to include pay cycles in the list of matters about which an IFA may be made for the same reasons;
- c) Proposal to vary cl 31.3 in relation to leave loading to allow employers to pay the cheaper of 17.5% or the applicable shift allowances and weekend penalty rates. This constitutes a reduction in employee entitlements;
- d) Proposal to introduce annualised wage arrangements would constitute a reduction in employee entitlements, particularly given it is proposed this could be imposed unilaterally by an employer;

- e) Clause 25.7 submission regarding work either side of a sleepover shift. The issue raised is already subject to separate proceedings commenced by AiG to which the union is responding (matter AM2023/28). It is appropriate that the matter continue to be dealt with in that forum and not in this stream of the Review;
- f) Proposal to vary cl 27.2 to allow tea breaks and meal breaks to be combined would undermine the purpose of the tea break entitlement. Efforts should be made to ensure employees can take much needed breaks in the course of their work, not to find ways around that entitlement.

Chamber of Commerce and Industry Western Australia (WACCI):

- a) Proposal to vary cl 27.1 goes well beyond making the award easier to use and would constitute a reduction in employee entitlements;
- b) Proposal to vary cl 10.3 to remove the default position that an employer must not require a part-time employee to work additional hours in excess of their guaranteed hours would constitute an undermining of an important safeguard for employees;
- c) Proposal to vary cl 25.4 to reduce the break between shifts from 10 to 8 hours goes well beyond making awards easier to use and would reduce an important health and safety safeguard for employees;
- d) Proposal to vary cl 25.10 to remove the minimum one-hour payment for training modules completed remotely would constitute a reduction in employee entitlements;
- e) Proposal to vary cl 28.2 to vary arrangements relating to time off in lieu of overtime would constitute a reduction in employee entitlements including because it could promote the use of overtime over ensuring adequate staffing levels.

Australian Workforce Compliance Council (AWCC):

- a) The AWCC has submitted that the following clauses should be simplified, or guidance provided but has not advanced any proposals: clauses 1, 2, 3, 4.8, 5, 6, 7.6, 7.1, 7.4 (re guidance), and 8.1. Given the President's Statement of 15 September 2023 indicated this stream of the Review would not involve any open-ended reconsideration of the terms of modern awards, these submissions should not be open for discussion in the consultation process;
- b) Proposal to vary cl 7.4 to allow IFA's to be entered into prior to an employee commencing employment would remove an important safeguard, having regard to the particularly unequal bargaining position of a prospective employee as compared to a prospective employer;
- c) Proposal to vary cl 20.2(b) to make the clothing and equipment allowance payable per day rather than per shift could constitute a reduction in entitlements for employees who undertake more than one shift on a day;
- d) Proposal to vary cl 20.5 to remove the requirement at sub-clause (c) to pay the meal allowance on the day overtime is worked if requested would constitute a reduction in employee entitlements. An entitlement should not simply be removed because it is asserted it is difficult to administer;
- e) Proposal to vary cl 25.1 to remove the requirement that shifts may be worked up to 10 hours at ordinary hours by agreement only is a clear reduction in employee entitlements;

- f) Proposal to vary cl 25.3 with respect to rostered days off. It is unclear to the HSU what the AWCC is trying to achieve with its proposed variation. In any event, it does not appear to make the Award any easier to use;
 - g) Proposal to vary cl 25.5(d) with respect to roster changes. Again, it is unclear to the HSU how the proposed variation will assist in making the Award easier to use.
 - h) Proposal to vary cl 25.7 to vary the sleepover clause. As noted above, this clause is currently the subject of an application to vary brought by the AiG (matter AM2023/28). That is the appropriate forum for discussion of this clause;
 - i) Proposal to vary cl 25.4 with respect to rest breaks between rostered work. The proposed variation does not appear to make the clause any clearer and therefore the Award any easier to use;
 - j) Proposal to vary cl 31.5 to insert guidance with respect to the cashing out of annual leave. The proposed guidance appears to simply be a repetition of what already appears in the clause and thus does not make the Award any easier to use.
7. It is the HSU's view there is no utility in the above listed proposals being discussed during the course of the conferences. It is open to the parties who have made these proposals to pursue applications to vary the Award outside this process if they wish to.
8. In addition to the above, the HSU also notes that the AiG has made a proposal to vary cl 15 of the Award to allow employers to pay full time employees either the weekly rate or 38x the hourly rate of pay. Given this appears to be an issue arising across modern awards generally, to promote a consistent approach and afford procedural fairness it is the HSU's view this matter would be better addressed in a separate process outside this stream of the Review.

Proposals which may benefit from discussion

9. The HSU is of the view that the following proposals (with respect to the SCHADS Award) merit discussion in the conference process for making awards easier to use stream of the Review:
- a) The AiG's proposal to clarify language in clause 31.3 – Annual leave loading – with respect to the use of the words 'penalties' (as the clause is currently written) vs 'penalty amounts' (the language AiG proposes). (However, for clarity, as noted above, we do not support the AiG's further proposal with respect to cl 31.3 which would allow employers to pay a lower amount of leave loading. This proposal would result in a reduction in employee entitlements and is therefore inconsistent with the terms on which the FWC called for proposals.);
 - b) The AiG's proposal to vary all 'in writing' and signature related provisions in the Award to insert the words 'including by electronic means'. The HSU is open to a discussion about this as a general principle, but would note that it may not be appropriate for all of the provisions identified where it may undermine important safeguards (for example, in relation to cl 10.3(e));
 - c) The AiG's proposal to delete cl 10.5A and Sch A of the Award;
 - d) The WACCI's proposal to vary cl 25.5(d)(i) – Change in roster to refer to the need to consult and to extend the period of notice to 28 days;

- e) The AWCC's proposals to vary clauses 10.2 and 10.3 of the Award to clarify that the averaging of hours for full time and part time employees is to be calculated by reference to cl 25.1;
- f) The AWCC's proposal to vary cl 10.5 – Minimum payments to remove the words 'except when undertaking disability services work';
- g) The AWCC's proposal to vary cl 20.6(a) – First aid allowance to use a dollar amount in place of a percentage;
- h) The AWCC's proposal to vary cl 20.12 – Broken shift allowance to remove the words (at (b)) 'agrees to work'.

10. The HSU looks forward to discussing these proposals in the conference process.

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