Australian Industry Group

Modern Awards Review 2023 – 24
Job Security

Reply Submission
(AM2023/21)

21 February 2024

AM2023/21 MODERN AWARDS REVIEW 2023 – 24

JOB SECURITY

1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) is filed in relation to the Modern Awards Review 2023 – 24 (**Review**) being conducted by the Fair Work Commission (**Commission**). Specifically, it is advanced in response to submissions filed by the following interested parties in relation to the issue of *'job security'*:

   (a) The Australian Council of Trade Unions (**ACTU**);

   (b) The Australian Manufacturing Workers' Union (**AMWU**);

   (c) The Australian Services' Union (**ASU**);

   (d) The United Workers' Union (**UWU**);

   (e) The Construction, Forestry and Maritime Employees' Union – Manufacturing Division (**CFMEU**);

   (f) The Shop, Distributive and Allied Employees' Association (**SDA**); and

   (g) The Australian Nursing and Midwifery Federation (**ANMF**).

2. Our submissions are arranged by reference to the questions posed in the discussion paper published by the Commission on 18 December 2023 (**Paper**).

3. This submission should be read in conjunction with the submission we filed on 5 February 2024 (**February Submission**).

4. In broad terms; the unions' submissions propose various significant, if not radical, changes to the safety net. Their submissions are, to varying degrees, based on factual assertions that we dispute, and in some cases, they rely on contestable legal propositions. Several proposals appear to have little (if any) connection with the objective of improving access to secure work; that is, the matter which is central to this aspect of the Review. The unions' submissions largely ignore the profound impact that many of their claims, separately and cumulatively, would have on employers and the economy more generally.

5. Due to the nature of the submissions advanced by the unions and the limited period of time available to prepare these submissions in reply, it has not been practicable to comprehensively deal with the material filed. Rather, our submission highlights some of the key arguments against it.

6. As will be borne out in the submissions that follow, we oppose the overwhelming majority of claims made by the unions. For the reasons set out, the Commission should not endorse or adopt those proposals in this Review.

7. Further, given that we contest many of the unions' factual assertions and the absence of any requirement to file evidence in this proceeding, the Commission should not adopt them. Similarly, limited weight, if at all, should be given to the survey results and case studies presented by the SDA and ASU, respectively. Respondent parties cannot practicably interrogate this material.

2. QUESTIONS 1 – 3

8. Question 1 is as follows:

> Are there specific provisions in the seven modern awards the subject of this review that parties consider are necessary to improve access to secure work across the economy? Parties are specifically asked to consider:
>
> a. Types or modes of employment;
>
> b. Rostering arrangements, including rostering restrictions;
>
> c. Payment of wages, in particular pay cycles;
>
> d. Agreed regular patterns of work or guaranteed hours for part-time employees; and
>
> e. Minimum engagement/payment periods.

9. Question 2 is as follows:

> Are there any additional specific award provisions that are consistent with the new modern awards objective? If so, parties are asked to consider and address whether it is relevant and necessary to vary any awards to include that or those specific award provision(s).

10. Question 3 is as follows:

> Are there specific award provisions that are not consistent with the new modern awards objective? If so, parties are asked to address whether it is relevant and necessary to vary any awards to amend or remove that specific award provision.

The ACTU ([11] and Recommendation 2)

11. The ACTU's submission only identifies common themes emerging from the submissions of its affiliates in responses to questions 1 – 3 of the Paper.[1] For the reasons that follow, we do not support the overwhelming majority of the proposals advanced by its affiliates and by extension, we oppose *'Recommendation 2'* advanced by the ACTU.

[1] ACTU submission dated 5 February 2024 at [11].

The AMWU ([10] – [13])

12. The AMWU advances two submissions in response to questions 1 – 3.

13. *First,* the AMWU contends that clause 7 of the *Manufacturing and Associated Industries and Occupations Award 2020* (**Manufacturing Award**) should be *'expanded to other [m]odern [a]wards'*.[2]

14. We would welcome the introduction of additional facilitative provisions in the modern awards system, that enable employers and employees to agree to alter the application of award terms, where this would result in greater flexibility. Such provisions would likely be of particular benefit in the context of hours of work provisions.

15. We would, however, oppose the replication of various other aspects of clause 7 of the Manufacturing Award in additional awards (for example, clauses 7.2(b), 7.3(b) and 7.4(c)). They impose unnecessary requirements and in the case of clause 7.4(c), create an unjustifiable role for unions.

16. *Second,* the union argues that part-time employment provisions should be altered in the following ways:

    (a) Specifying a minimum number of part-time hours that *'can be included in standard contracts'*;

    (b) Requiring employers to pay overtime rates for hours worked outside *'contracted hours'*; and

    (c) Including automatic mechanisms for review where employees are *'consistently working above contracted hours'*.[3]

17. It is not the role of modern awards to expressly regulate the content of employment contracts and on that basis, we would oppose the first contention above.

[2] AMWU submission dated 5 February 2024 at [11].

[3] AMWU submission dated 5 February 2024 at [13].

18. Irrespective of this; the introduction of a minimum number of hours for which a part-time employee must be engaged would in fact be contrary to improving access to secure work. It would result in the imposition of an award-derived barrier to engaging part-time employees (for example, where the employee does not wish to work more than the minimum amount or the employer does not require more hours to be worked). In such circumstances, the employers and employees would necessarily need to consider other options, including alternate forms of engagement, such as casual employment.

19. In our February Submission, we explained that the new statutory definition of casual employment (which will take effect six months from the day after the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2024* (Cth) (**Closing Loopholes No. 2 Bill**) receives Royal Assent), will create a regulatory gap between it and the definition of part-time employment typically found in modern awards.[4] In some cases, the existing arrangement of an employee may not conform with the definition of casual or part-time employment. The introduction of a minimum hours requirement in awards for part-time employees would only exacerbate this issue.

20. Generally, awards already require the payment of overtime rates for work performed outside the employees' agreed hours. A small number of awards provide exceptions to this. For example, under the *Social, Community, Home Care and Disability Services Industry Award 2010* (**SCHCDS Award**), a part-time employee is not entitled to overtime rates except where they work more than 38 ordinary hours in a week, outside the span of hours or in excess of the maximum number of daily hours. Further, the award expressly states that an employer and part-time employee can agree that the employee will work additional hours.

21. Award provisions of this nature should be introduced in other awards. They would remove some of the fundamental barriers that presently discourage employers from engaging employees on a part-time basis. Further, they would better facilitate employment on a part-time basis; an outcome that is clearly consistent

[4] February Submission at [135] – [136].

with the new s.134(1)(aa) of the *Fair Work Act 2009* (**Act**). They would also encourage employers to offer additional hours of work in circumstances where they might not otherwise do so, due to the requirement to pay overtime rates. This would be of obvious benefit to those who wish to work additional hours and the underemployed.

22. Ai Group has specifically advanced proposals of the type described above in this Review in relation to the *Fast Food Industry Award 2020* (**FF Award**) and *General Retail Industry Award 2020* (**GRIA**), in the context of the consideration being given by the Commission to making awards *'easier to use'*.[5] There is also merit in the provision of such flexibility in other awards. It is a matter that should be given further consideration in this aspect of the Review.

23. We cannot see a basis for introducing a mechanism for reviewing part-time employees' hours of work where overtime rates are payable for work performed outside the employee's agreed hours. As a product of the requirement to pay overtime rates, there would be little if any incentive for an employer to engage an employee to work additional hours unless strictly necessary. Put another way, an employer is not likely to do so regularly. Indeed, the relevant award terms discourage employers from offering additional work.

The ASU ([11] – [31])

24. It appears that in response to questions 1 – 3 in the Paper, the ASU has focussed on three aspects of the awards system; rostering arrangements, part-time employment and flexible working arrangements. We deal with the balance of its submissions below, in the context of questions 4 – 8.

[5] Ai Group submission dated 22 December 2023 at [261] – [274] and [328] – [338].

Rostering Arrangements

25. The ASU contends that all modern awards should be varied to include the following standard terms:

    (a) A minimum published roster period of 28 days;

    (b) A minimum notice period for roster changes of 14 days;

    (c) A requirement to pay overtime rates for all work performed outside rostered hours;

    (d) A prohibition on rostering an employee to work more than five consecutive days;

    (e) A prohibition on working more than 12 hours in a day; and

    (f) *'Stronger'* consultation rights, clearly requiring that the consultation occur *'before an employer makes said changes'* to rosters or hours of work.[6]

26. The vast majority of awards do not require the publication of rosters and, by extension, they do not regulate the preparation or distribution of rosters, nor the circumstances in which they may be altered. This is entirely appropriate. How hours of work are arranged and communicated to employees is a matter that is best dealt with at the enterprise-level. The introduction of a one-size-fits-all rostering provision is likely to be unworkable in practice. Further, the level of prescription envisaged by the ASU proposal would be highly inappropriate and unfair.

27. Even within a given industry, different employers face different pressures and demands that influence how they arrange hours of work and how they communicate those arrangements to employees. For example, some employers may be exposed to supply chain volatility to a greater extent than others, thereby creating a greater need for rostering flexibilities. As explained in our February Submission, employers that engage directly with clients or customers may

[6] ASU submission dated 5 February 2024 at [13].

experience fluctuations in demand, which in turn affects their demand for labour (often, at short notice).[7]

28. Plainly, a requirement to provide 14 days' notice of a change to a roster would simply not be viable in countless scenarios. It is critical that employers are able to make changes to the roster with less notice where, for example, staff rostered to work are unexpectedly absent or there is an unanticipated change in operational demands. The kind of rigidity contemplated by the ASU proposal could have devastating implications for employers by completely undermining their ability to efficiently and productively operate their business. Ultimately, in some sectors (such as those covered by the SCHCDS Award), such limitations may also impact clients who are in need of the employers' services.

29. The ASU's submissions focus specifically on the *Airline Operations – Ground Staff Award 2020* (**Ground Staff Award**). This award covers employees who, *inter alia*, perform various air-side and land-side tasks at airports, the timing of which are dictated entirely by flight schedules. It is notorious that those schedules are regularly susceptible to short notice aberrations, often for reasons that are well beyond the employer's contemplation or control. Examples include unexpected weather events, mechanical issues with an aircraft and issues arising from the schedule of arrivals and departures prepared by various airports.

30. It is essential that an employer who, for instance, provides baggage handling services or ground staff responsible for checking in travellers, is able to respond to such scenarios. This sector is a prime example of one in which employers need to be particularly agile. There may be widespread implications of not being so – for customers, airlines, airports and the like.

31. In the circumstances, the notion that the Ground Staff Award should be varied to further limit the flexibilities available under it is, from the perspective of employers, absurd. Employers commonly raise concerns about the *absence* of sufficient flexibility under the award and the many challenges this presents for their operations. It is not unusual for enterprise agreements in the sector to

[7] February Submission at [122] – [127].

contain hours of work and part-time employment provisions that are *more* flexible than the award. These provisions are designed to afford employers the ability to roster employees in a way that would not be permitted under the award, so that they are better able to arrange labour efficiently and productively.

32. Finally, to the extent that the ASU advances its submission in respect of awards that do not cover its members, it should not be given any weight.

Part-time Employment

33. We refer to our submissions at [16] – [23] above, in response to the AMWU, which are also relevant to the ASU's submissions. In addition, we observe that the *'key terms'* identified by the ASU for part-time employment are present in the majority of modern awards. Only a small number deviate from this.[8]

34. In response to the ASU's submissions about the Ground Staff Award[9], we refer to and rely on the submissions made above at [29] – [31].

35. So far as the SCHCDS Award is concerned[10]; it is, again, an obvious example of an instrument that covers sectors in which rostering flexibility is critical. The scheduling of work in some sectors covered by the award is driven primarily by the choice and control of the employers' clients. Further, there are commonly changes to the schedule of client engagements, by virtue of changing client needs. On one view, the existing part-time framework does not go far enough in providing employers with requisite flexibilities. It certainly should not be curtailed.

[8] ASU submission dated 5 February 2024 at [19].

[9] ASU submission dated 5 February 2024 at [24].

[10] ASU submission dated 5 February 2024 at [23].

Flexible Working Arrangements

36. We dispute the ASU's submissions about flexible working arrangements in their entirety.[11]

37. Sections 65 – 65C of the Act deal with requests for flexible working arrangements in considerable detail. Not only does the Act give various categories of employees the right to request such arrangements, it also deals in some detail with the process that must be followed by employers who receive a request. Critically, those provisions expressly require that an employer discuss the request with the employee where they are unable to agree to it in the terms sought, including potential alternatives. An employer must *'genuinely try to reach agreement'* with an employee before refusing a request.[12]

38. Clearly, these provisions, in effect, require an employer to consult an employee in respect of a request. They overlap squarely with what is now being sought by the ASU in the context of the awards system. Such provisions cannot be said to be *necessary* given the extensive treatment of the issue in the NES.

39. Indeed, the NES also grants the Commission the power to arbitrate disputes arising from requests for flexible working arrangements.[13] Only a small number of applications have been made to the Commission to deal with such disputes[14]; which suggests that the process contemplated by the NES is potentially resulting in many such requests being resolved to the satisfaction of employees at the workplace level.

40. Self-evidently, the *'case studies'* included in the ASU submission should not be given any weight. They cannot in any way be verified by respondent parties, given that the employee and employer are not identified therein.

[11] ASU submission dated 5 February 2024 at [29] – [31].

[12] Section 65A of the Act.

[13] Section 65B(4)(b) of the Act.

[14] President's statement, *Fair Work Commission's 2023 work and 2023-24 performance,* dated 22 December 2023 at [29].

The UWU ([5] – [23])

41. At [6] – [13] of the UWU's submission, it identifies various existing award provisions in response to question 1 in the Paper. We do not propose to respond to these submissions, on the basis that the union is not advancing any claims in respect of those matters in this proceeding.

42. The UWU proposes that awards be varied *'clarifying the status and payment'* of certain activities such as undertaking online training and rapid antigen testing.[15]

43. It should be noted that both of the authorities cited by the UWU in its submission[16] concern the specific terms of an enterprise agreement. They may be of limited relevance to the proper interpretation of a given award in relation to the issue of whether an employee is entitled to be paid for activities of the aforementioned kind.

44. Ultimately, whether the performance of such activities constitutes work and whether it attracts a particular payment will turn on the facts of the relevant scenario, including whether employees have been *directed* to perform the activities and the circumstances in which this occurred. The Commission should not adopt a default of approach of expressly regulating these matters through awards.

45. Further, as we have argued in other contexts; to the extent that employees are required to be paid for the performance of work remotely (including where, for example, attendance at meetings or training online constitutes work), no minimum engagement or payment period should apply. Historically, the justification for such entitlements has been to ensure that employees are adequately compensated for the inconveniences associated with physically *attending* work.[17] They do not apply where an employee is working remotely. It would be particularly inappropriate for existing minimum engagement or payment

[15] UWU submission dated 5 February 2024 at [14] – [21].

[16] UWU submission dated 5 February 2024 at [15].

[17] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [399].

periods to apply in the context of an activity such as undertaking rapid antigen testing, which takes only a limited period of time to complete.

The CFMEU ([9] – [93])

46. The submission filed by the CFMEU appears to deal exclusively with questions 1 – 3 in the Paper. Of the three awards about which the union has advanced submissions, we have a relevant interest in the *Textile, Clothing, Footwear and Associated Industries Award 2020* (**TCF Award**) and the *Timber Industry Award 2020* (**Timber Award**). We respond to the submissions made by the CFMEU in respect of those awards below.

TCF Award

47. *First,* the CFMEU submits that clause 8 of the TCF Award should be amended to require that:

    (a) An employer must inform an employee in writing of their *'terms of engagement'* (including whether they are full-time, part-time and casual);

    (b) Retain the above as a time and wages record; and

    (c) Inform an employee writing if the employee's *'employment type'* changes.[18]

48. There is no clear connection between the proposal and the need to improve access to secure work.

49. Further, the proposed provision is not clear. In particular, clause 8.2 would require an employer to inform an employee of the *'terms of their engagement and in particular whether they are to be full-time, part-time or casual'*. It would appear that the terms of an employee's engagement, for the purposes of this provision, would include the type of employment, as well as other terms. It is not, however, clear, what other information is required to be provided.

[18] CFMEU submission dated 5 February 2024 at [59].

50. The award should not be varied to include a vague provision of this nature. It also potentially overlaps with other existing award provisions, such as clause 11.3.

51. *Second,* the CFMEU argues that clause 10 of the award, which relates to part-time employment, should be amended in various ways[19], to address the alleged deficiencies outlined at [62] – [68] of the union's submission.

52. We advance the following submissions in response to the variations sought:

    (a) We oppose the introduction of a minimum weekly number of hours at clause 10.1(a) for the reasons articulated earlier at [18] – [19] of this submission.

    (b) The union's concerns about clause 10.2[20] are illusory. Nonetheless, we do not oppose the introduction of a reference therein to Schedule A. It does not appear that a reference to clause 19 would be useful.

    (c) There is no clear connection between the proposals advanced in respect of clauses 10.3 – 10.4 and the need to improve access to secure work.

    (d) We strongly oppose the proposed increase of the minimum engagement period prescribed by clause 10.5. The union does not advance a cogent justification for what would amount to a significant change; nor does it explain why the existing safety net is deficient in this regard. In any event, in our submission, it would potentially undermine access to secure work by limiting opportunities for work as a part-time employee (i.e. where an employer does not require more than three hours' work to be undertaken or an employee is not available to work more than three hours).

    (e) The proposed variations to clauses 10.6 – 10.7 are not explained in the union's submission. It is not clear why there are necessary.

[19] CFMEU submission dated 5 February 2024 at [66].

[20] CFMEU submission dated 5 February 2024 at [64].

53. *Third,* the CFMEU argues that clauses 11.3 and 11.4, which relate to casual employment, should also be varied.[21]

54. For the reasons set out above at [52(d)], we strongly oppose the proposed increase to the minimum payment period for casual employees. Any argument that the provision permits an employer to simply *pay* an employee for four hours' work, even if they are required to work for a shorter period, should be disregarded. That outcome would result in the imposition of potentially unsustainable or unjustifiable costs on employers.

55. In respect of the balance of the proposals; there is no clear connection between them and the need to improve access to secure work.

56. *Fourth,* the union argues that employees should be advised in writing of their classification level and any changes to their classification level. Currently, such information is to be provided only if requested by the employee.[22]

57. Again, it is not clear that there is a causal connection between the provision of such information and access to secure work. Additionally, we do not consider that the proposed change is necessary. The relevant information is already required to be provided whenever requested by an employee. There is no suggestion from the union that employers are failing to do so.

58. *Fifth,* in relation to clause 16.3(b) of the TCF Award, the union proposes that:

    (a) The provision be amended to require that an agreement between the employer and majority of employees to change start and finish times must be recorded *'in writing'* and kept as an employee's time and wages record.

    (b) The notice period for making unilateral changes to start and finish times should be increased from 7 days to 28 days.[23]

[21] CFMEU submission dated 5 February 2024 at [67] – [69].

[22] CFMEU submission dated 5 February 2024 at [70] – [73].

[23] CFMEU submission dated 5 February 2024 at [74] – [76].

59. The first of the above changes is not necessary. Clause 7.5 already requires that an agreement reached must be recorded in the time and wages record. It is not clear that the proposal for clause 16.3(b) seeks to achieve something different.

60. As for the latter proposition; we strongly oppose the extension of the notice period sought by the union. It would significantly and unfairly limit the circumstances in which an employer could change start and finish times.

61. In any case, employees would likely have more than 7 days' notice of such a change in practice, due to the operation of the model consultation clause about changes to regular rosters and ordinary hours of work. Where that provision applies, the employer must provide information about the change before it is implemented, and consult employees, including about the impact that the change would have on them.

Timber Award

62. *First,* the union seeks variations to clause 9 in the same terms as its proposal described above in relation to clause 8 of the TCF Award.[24] We refer to and rely on [47] – [50] of our submission above in this regard.

63. *Second,* the union proposes various changes to clause 11 of the Timber Award, which are in the same terms as those proposed to clause 10 of the TCF Award.[25] We refer to and rely on [51] – [52] of our submission above in this regard.

64. *Third,* the union argues that the award should expressly require that employees are advised in writing of their classification level and any changed therein.[26] It is not clear how this variation would improve access to secure work.

[24] CFMEU submission dated 5 February 2024 at [77] – [81].

[25] CFMEU submission dated 5 February 2024 at [82] – [88].

[26] CFMEU submission dated 5 February 2024 at [89] – [93].

The SDA ([17] – [43])

65. The SDA advances various submissions in response to questions 1 – 3, including multiple proposals to vary the FF Award and the GRIA.

Question 1

66. In response to question 1, the SDA advances three key propositions:

    (a) Awards that permit ordinary hours to be worked on all seven days in a week need to be varied *'to provide some stability and certainty in when an employee can be rostered'*.[27]

    (b) Awards that permit ordinary hours to be worked throughout the course of a calendar day (i.e. they do not contain a span of hours), also need to be varied for the purposes of achieving the above objective.[28]

    (c) Awards should include a *'right to become full time when working fairly consistently on average 35 hours or more per week'*.[29]

    (d) The GRIA and FF Award should be amended to provide for a *'regular pattern of work … so it is clear … that this is a right of full time workers'.*

67. We oppose each of the above proposals.

68. The ability to require employees to perform ordinary hours of work seven days a week in the retail and fast food sectors is critical, because many businesses in these sectors operate throughout the week. The same can be said of the absence of a span of hours in the FF Award. Many fast food outlets operate 24 hours a day, 7 days a week.

[27] SDA submission dated 5 February 2024 at [18] – [19].

[28] SDA submission dated 5 February 2024 at [20].

[29] SDA submission dated 5 February 2024 at [27].

69. Various perverse consequences would flow if the span of hours in the GRIA was reduced or if one were introduced in the FF Award. In particular, any work outside those parameters would constitute overtime and thus:

(a) Employers would not have an unfettered right to *require* employees to perform work at such times.[30] This would create significant uncertainty for employers as to whether they will be able to arrange labour in a way that enables them to conduct their operations at the relevant times.

(b) Some employees may, ultimately, work more, longer, hours than would otherwise be the case, by virtue of the overtime worked. This could give rise to concerns associated with fatigue management and their workplace health and safety.

(c) Employers may not be able to offer full-time hours of work to the same extent as is presently the case and / or their capacity to offer guaranteed hours to permanent part-time employees may be reduced.

(d) Employees would not be entitled to the mandatory superannuation guarantee in respect of overtime earnings.

(e) Employees would not accrue leave or be entitled to take leave in respect of overtime hours.

70. None of the outcomes described above would improve access to secure work. Indeed, they would generally serve to undermine employees' interests.

71. It is also relevant to note that:

(a) The GRIA prescribes a more limited span of hours on weekends *vis-a-vis* weekdays.[31]

[30] Clause 21.1 of the GRIA and clause 20.1 of the FF Award.

[31] Clause 15.1 of the GRIA.

(b) Both awards require the payment of significant penalty rates for ordinary hours of work performed on weekends.[32]

(c) The GRIA requires the payment of penalty rates for ordinary hours worked in the evening on weekdays.[33] Similarly, the FF Award requires the payment of penalty rates for ordinary hours worked after 10pm or before 6am on weekdays.[34]

(d) Both awards place other parameters around the arrangement of ordinary hours of work, which provide safeguards.[35] In particular, the GRIA contains multiple layers of prescription as to how hours of work may be rostered.

72. The Commission should not entertain the proposed right to convert to full-time employment. This would constitute a significant step, that is not supported by cogent reasons. In particular, the SDA submits that *'full time employment provides greater security (ie no fluctuations in hours over a roster period)'*.[36] The same can be said of part-time employment in both awards. Indeed, we would argue that part-time employees enjoy *greater* certainty of hours than full-time employees, because their hours of work must be *agreed* and can only be varied with the employee's consent. By comparison, the relevant awards provide employers greater flexibility regarding the scheduling of full-time employees' hours of work.

73. By extension, neither the FF Award nor the GRIA should be varied to introduce a *'right'* to *'regular patterns of work'* for full-time employees. Contrary to the SDA's submission, no such right presently exists and thus, the proposed term would not merely *'clarify'* the effect of the awards.[37] Rather, it would introduce a new substantive right. Whilst the awards contain various parameters within which full-time employees' hours must be set and to some extent, their effect may be

[32] Clause 22.1 of the GRIA and clause 21 of the FF Award.

[33] Clause 22.1 of the GRIA.

[34] Clause 21 of the FF Award.

[35] Clause 15 of the GRIA and clause 13 of the FF Award.

[36] SDA submission dated 5 February 2024 at [27].

[37] SDA submission dated 5 February 2024 at [28].

to provide full-time employees with some certainty as to their hours of work, they do not afford employees an absolute right to regularity.

Question 2

74. In response to question 2, the SDA refers to the pay cycle arrangements in the GRIA and FF Award being consistent with the modern awards objective (**MAO**).[38]

75. For the reasons set out in our submission regarding *'making awards easier to use'*, awards should be varied to allow greater flexibility in relation to pay cycles.[39] Further, properly conceived of, the consideration articulated at s.134(1)(aa) is not enlivened when considering award terms concerning pay cycles.[40]

Question 3

76. In response to question 3, the SDA again advances a number of proposals to vary the FF Award and GRIA. We deal with each in turn.

77. *First,* the SDA argues that the part-time employment provisions should provide for a minimum of 15 hours' guaranteed work each week. We strongly oppose this proposal, for the reasons set out earlier at [18] – [19]. It would almost invariably result in some employees or prospective employees not being able to access permanent employment under the award. We cannot fathom how this could be said to be consistent with s.134(1)(aa).

78. For completeness, we also note that contrary to the SDA's submission, the awards do not currently contain a minimum weekly engagement period of three hours.[41] They contain a minimum engagement / payment period per *shift;* however, employers are not compelled to provide at least three hours of work in every *week*.

[38] SDA submission dated 5 February 2024 at [30].

[39] Ai Group submission dated 22 December 2023 at [63] – [77].

[40] February Submission at [24] – [58].

[41] SDA submission dated 5 February 2024 at [33].

79. *Second,* the SDA proposes that employees be given *'the right to status quo on a roster dispute'*.[42]

80. We strongly oppose this. The resolution of a dispute in some cases can require an extended period of time. Employers should not be precluded from implementing (often critical) changes to rosters in the intervening period. We note that currently, the dispute resolution process expressly (and, appropriately) requires that employees must not unreasonably fail to comply with a direction about performing work while a dispute is on foot, provided that it is *'safe and appropriate'* for the employee to do so.[43]

81. In some cases, the proposal would effectively render a proposed roster change otiose, because it would apply during a limited period of time which will necessarily pass by the time the dispute is resolved.

82. *Third,* the SDA submits that employees should have the right to unilaterally seek the arbitration of a dispute about a roster by the Commission.[44]

83. The Commission cannot vary awards to provide a unilateral right to arbitration. Thus, this claim must fail.

84. *Fourth,* the union argues that employees should be required to pay employees *'penalty rates'* while an employee is on personal / carer's leave.[45] Although not specified in its submissions, it appears that the union is seeking the introduction of an entitlement to penalty rates during a period of leave that would have been payable to an employee had they worked during the relevant period.

85. We oppose this proposal. For the reasons set out in a submission we recently filed regarding *'making awards easier to use',* similar provisions in some awards concerning annual leave are difficult, if not entirely impracticable, to administer.[46]

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[42] SDA submission dated 5 February 2024 at [38].

[43] See for example clause 30.8(b) of the FF Award.

[44] SDA submission dated 5 February 2024 at [38].

[45] SDA submission dated 5 February 2024 at [40].

[46] Ai Group submission dated 22 December 2023 at [100] – [134].

86. They would also:

(a) Increase the regulatory burden and employment costs; and

(b) Remove an incentive for employees to return to work from leave.

87. *Finally,* we would not oppose the SDA's proposal regarding the introduction of pay averaging[47]. As the union submits, such arrangements provide greater certainty to employees. In addition, they materially reduce the regulatory burden of employers. We have advanced similar proposals in a submission concerning *'making awards easier to use'*.[48]

The ANMF ([19] – [107])

88. The ANMF proposes a raft of significant changes in respect of part-time employment, overtime, progression through pay points, various allowances, minimum engagement periods, the entitlement to an additional week of annual leave for shiftworkers, pay periods, rostering and the night shift loading.

89. Ai Group does not support any of these proposals and indeed strongly opposes many of them. The variations sought:

(a) Do not necessarily engage s.134(1)(aa). They are directed simply at improving employee terms and conditions.

(b) Would have various significant adverse implications for employers. They would increase employment costs, reduce efficiency, undermine productivity and / or increase the regulatory burden.

90. In the time available to prepare this submission, we are not in a position to respond to each of the claims individually. In any event, given the nature of this process and the claims advanced, the Commission should not proceed to endorse or adopt any of the proposals.

[47] SDA submission dated 5 February 2024 at [41] – [43].

[48] Ai Group submission dated 22 December 2023 at [41] – [62].

3. QUESTIONS 4 – 5

91. Question 4 is as follows:

> Having regard to the new modern awards objective, should the exclusion of casual employees from accessing certain NES entitlements (such as paid personal leave) continue?

92. Question 5 is as follows:

> Should any of the awards be varied to supplement these NES entitlement gaps for casual employees?

93. Ai Group's February Submission dealt with questions 4 and 5 of the Paper jointly. We adopt a similar approach in reply to the submissions filed by other parties.

94. Before doing so, it is necessary in light of recent developments to revisit the position set out at [159] – [163] inclusive of the February Submission. Those paragraphs described proposed changes to the Act under the Closing Loopholes No. 2 Bill which, if enacted, would affect the extent to which casual employees are excluded from accessing certain NES entitlements (such as those referred to at [144](d) of the February Submission). Those changes now form part of what will be the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) (**Closing Loopholes No. 2 Act**), following the successful passage of the bill through parliament on 12 February 2024 and its receipt of Royal Assent.

95. The Closing Loopholes No. 2 Act will implement a new definition of '*casual employee*' by replacing the existing s.15A of the Act with a new definition that is different, but is relevantly similar in substance, to the proposal described at [96] of our February Submission.[49] The government expects this amendment will reduce the level of casual employment. In essence, it will narrow the scope for an employer to elect to engage a new employee as a casual employee. This change is complemented by a new casual conversion mechanism that will afford a capacity for casual employees to convert to permanent employment (if their engagement ceases to align with the new narrow conception of casual employment).

[49] Clause 1 of Part 1, Schedule 1 to the Closing Loopholes No. 2 Bill.

96. The new casual conversion mechanism is an '*employee choice*' process that will operate in place of the existing provisions of the Act dealing with casual conversion. Crucially, conversion will be available to employees of small business employers and will potentially be available at an earlier time for employees of employers other than small business employers. The Commission will also be given wide ranging powers to deal with disputes related to the new conversion provisions. Whilst there have been changes to the proposal originally contained in the Closing Loopholes No. 2 Bill (described at [98] - [100] of our February Submission), given the enhancement of casual conversion rights brought about by this new mechanism, Ai Group maintains its position at [163] of the February Submission.

97. The Closing Loopholes No. 2 Bill also increases the frequency with which casual employees are required to be provided with a copy of the Casual Employment Information Statement[50]. This change to the Act – which did not form part of the initial Closing Loopholes No. 2 Bill - represents an enhancement of the NES for casual employees. It is likely to have the effect of heightening casual employees' awareness of their right to exercise a choice to change to permanent employment under the new process and, as a corollary, increase the effectiveness of the changes. This is consistent with and further bolsters [163] of our February Submission.

Overarching Response to the Unions' Material

98. Before addressing the specific submissions of the unions, we observe that the merit of the variously described contentions that casual loadings should be increased, or that the NES entitlements should be extended to casual employees, are outweighed by the following overarching and countervailing considerations.

[50] Clause 19 of Part 1, Schedule 1 to the Closing Loopholes No. 2 Bill.

99. *First*, the very nature of casual employment now permissible under either awards or the NES is fundamentally different from the notion of casual employment as historically conceived of and as contemplated when awards were first made. A Full Bench of the Commission summarised this position as follows:

> In respect of the modern award context with which we are concerned, casual employment has under most modern awards evolved into an alternative payment and entitlement system available at the election of the employer upon engagement.[51]

100. This position was reflected in the pervasive adoption in awards of the approach of defining a *'casual employee'* as '*an employee engaged and paid as such'*. In contrast, the availability of casual employment going forward will be tightly constrained to circumstances that meet the new statutory definition, unless an employee desires their engagement to continue on a casual basis, notwithstanding it having evolved into a form that would qualify them to seek conversion.

101. The new constraints on casual employment are a complete answer to any contention that awards should disincentivise the engagement of casual employment (regardless of how fundamentally lacking in merit such contentions are in any event). Coupled with the new pathway to permanent employment for those that want it, the new statutory provisions also provide a powerful remedy to any concern that the lack of access by casual employees to NES entitlements, or the current level of casual loading, is in any way unfair.

102. *Second*, any contention that the casual loading should be reassessed must be carefully weighed against the considered decision of the Full Bench of the Australian Industrial Relations Commission to achieve a level of standardisation of this entitlement, and the extent to which the same logic has been adopted to justify increasing the casual loading. The adoption of a standard approach assists in making the system '*simple and easy to understand*'. Not only would changing the level of the casual loading in some awards undermine this, it would, on its face, render the maintenance of increases to casual loadings in some

[51] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [85].

sectors arguably unjustifiable. Put another way, it would be inappropriate to *'cherry pick*' a select number of awards in relation to which it might be said that the casual loading should rise, given industry specific considerations, without also reassessing the appropriateness of previous decisions to raise the casual loading in pursuit of a standardised approach.

103. *Third*, any consideration of varying the casual loading, or increasing entitlements must be carefully weighed against the impact that it will have upon employers and employees, as well as the broader economy. Ultimately, any consideration of the matters identified in questions 4 and 5 requires a far more considered assessment than will be possible through this Review. The truncated timetable afforded to parties to respond to each other's claims and the absence of any capacity to put relevant evidentiary material before the Commission contribute to this. Given such constraints, the Commission could not form any views as to the merits of either increasing the causal loading or otherwise altering entitlements of casual employees.

104. *Fourth*, the Commission should also be mindful that the new legislative provisions have not yet commenced operation. As such, it is premature to make any determination that changes to entitlements of casual employees are warranted as a consequence of the changed statutory objectives under consideration in these proceedings. Any assessment of the operation of casual employment under the new legislative provisions will, at this stage, inevitably be somewhat speculative. Similarly, the effect of broader legislative changes introduced elsewhere in the Government's industrial relations reforms which have the potential to restrict or modify, in various ways, the basis upon which businesses access labour is also unclear. This includes changes relating to the use of fixed term contracts[52], measures to '*[close] the labour hire loophole*',[53] changes to the fundamental nature of the capacity of a business to engage a worker as a contractor rather than an employee,[54] and novel new powers for the

[52] Division 5 of Part 2-9 of the Act.

[53] Part 6 of Schedule 1 to the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth).

[54] Part 15 of Schedule 1 to the Closing Loopholes No. 2 Act.

Commission to regulate the terms of some contractors.[55] Given such uncertainty, now is clearly not the time to fundamentally alter the manner in which casual employment entitlements are determined.

105. It would be inappropriate to implement any major change to the regulation of casual employees through the award system when the legislative regime is in such a state of flux and the impact of fundamental changes to it is so inherently unclear. The merit of this contention is reinforced by the fact that the various contentious legislative amendments are required, at law, to be subject to review in a relatively tight timeframe.[56] Such reviews may be a catalyst for further legislative change. They may also highlight relevant matters for the Commission's consideration. Any variation to award terms relating to casual employment in the current circumstances would be contrary to the imperative to maintain a stable award system.[57]

106. We now turn to specifically responding to the various submissions of other interested parties. Our responses supplement Ai Group's position as outlined in the February Submission, and specifically Chapter 10 ([138] – [164]).

The ACTU ([12] – [24] and Recommendations 3 – 6)

107. Ai Group disagrees with the proposition that the amended MAO gives rise to a need (let alone a '*fundamental*' need) to consider notions of fairness with respect to accessing entitlements which are usually incidents of more secure forms of work.[58] Nothing in the plain meaning of s.134(1)(aa) states or suggests that it is directed towards access to the incidents of secure work.

108. It follows that, consistent with the position outlined at [146] and [153] – [158] of our February Submission, Ai Group opposes the proposal contained in the ACTU's *'Recommendation 3'* for the Commission to focus its efforts in this Review on improving entitlements associated with casual employment.

[55] Part 16 of Schedule 1 to the Closing Loopholes No. 2 Act.

[56] See, for example, section 4 of the Closing Loopholes No. 2 Bill.

[57] Section 134(g) of the Act.

[58] ACTU submission dated 5 February 2024 at [13].

109. The proposal for modern awards to move away from a standardised 25% casual loading to industry-level differentials will increase the regulatory burden on employers covered by multiple modern awards, as it would require those employers to apply different entitlements across different award-covered cohorts in their workplaces. This is likely to increase complexity and, so far as the ACTU calls for an increase to the casual loading, also increase the cost burden on employers.

110. Ai Group opposes *'Recommendation 6'* on the same basis. For the reasons set out above, conferring paid compassionate leave entitlements on casual employees is neither necessary nor appropriate in the context of the MAO (including as updated by s.134(1)(aa)). In the alternative, should the Commission be minded to entertain the idea, it is imperative that the proposal be considered in the context of the incidents of employment already compensated for as part of the casual loading (including any potential need to rebalance the loading to avoid duplication of benefits).

111. Ai Group strongly opposes the ACTU proposals contained in '*Recommendations 4 and 5'*. The propositions advanced at [20] – [22] of the ACTU's Submission, which concern an alleged lack of protection for casual employees who are absent from work due to illness or injury are myopic, and overlook the complex and over-regulated system of State, Territory and Commonwealth laws which already provide protections for employees with disability. The recommendations would contribute to the over-regulation of rights and obligations surrounding illness and injury (more broadly conceptualised as *'disability'*) at work. In this context, the proposed changes are neither *necessary*, nor consistent with s.134(1)(f) of the Act in so far as they are likely to further increase the existing burden on employers.

The AMWU ([14] – [18])

112. The AMWU's assertion regarding a so-called '*rising trend of casual employment*' is not supported by statistical data. The rate of casual employment has remained largely stable for decades. To the extent that there has been a change, it is in fact decreasing over time.[59] In addition, the Closing Loopholes (No. 2) Bill is intended to significantly reduce the types of employee arrangements able to be characterised as casual, while at the same time, bolster the ability of casual employees to exercise a choice to become a permanent part-time or full-time employee. Any perceived need for a reduced qualifying period to elect to convert (or now, to '*choose*') to become a permanent employee must be tempered in this context.

113. The AMWU's proposal that the Commission ought to have the power to arbitrate '*any disputes concerning work status, contractual arrangements, and/or casual conversion*' [60] is an attempt to impose a wide-ranging and inappropriate constraint on employer decision making with respect to workforce composition and the terms and conditions of employees, which will be both burdensome and costly. The proposal is inconsistent with s.134(1)(f) of the MAO. Further, in the context of s.134(1)(aa) of the Act, constraints such as those proposed by the AMWU have the potential to hamper the ability of a business to be agile and responsive to market forces which in turn, may have a negative bearing on the extent to which employees have access to secure work.[61] The capacity of the Commission to deal with disputes relating to casual employment and set terms and conditions for casual employees is already comprehensively dealt with by the legislation (in its current form and as it will be amended). It would be highly inappropriate for the Commission to seek to expand its capacity to resolve disputes in the manner proposed by the union. At the very least, such provisions would not be *necessary* in the sense contemplated by s.138 of the Act.

[59] February Submission at [63].

[60] AMWU submission dated 5 February 2024 at [17].

[61] See, for example, February Submission at [196] – [200].

114. Ai Group opposes the proposal in the AMWU's submission at [18] on the basis outlined at [111] above.

The ASU ([32] – [36])

115. The ASU's Submission appears to be premised on an inaccurate assessment of existing casual employee entitlements[62], including the current rights of casual employees to be absent from work for the purpose of '*caring for a loved one*'[63] and participating in eligible community service activities (which includes a voluntary emergency management activity).[64]

116. In response to the ASU's calls for a '*strengthened adverse action jurisdiction'* and creation of a new statutory right of casual employees to be absent from work for reason of illness or injury, Ai Group repeats its submission set out at [111] above.

117. Ai Group strongly opposes any increase to the casual loading for the purpose of disincentivising employers to engage employees in casual employment. The primary purpose of a casual loading is to compensate casual employees for particular entitlements that are not incidents of casual employment. Proposals aimed at increasing barriers to the utilisation of forms of work said to be less secure (such as casual employment) do not of themselves improve access to more secure forms of work (such as permanent employment). The addition of s.134(1)(aa) to the MAO may suggest a need for consideration to be given to proposals that support or improve an employer's ability to make available secure work (being a necessary precursor to employees being able to access secure work), including the removal of any award-derived barriers to offering secure work – not on the creation of heightened barriers to make less secure forms of work, less accessible.[65]

[62] ASU submission dated 5 February 2024 at [34].

[63] Casual employees have the right to take unpaid carer's leave pursuant to s.102 of the Act and unpaid compassionate leave pursuant to s.104 of the Act.

[64] Section 108 of the Act.

[65] February Submission at [48].

The SDA ([44] – [45])

118. In response to the SDA's proposal for casual employees to be afforded a paid bereavement leave entitlement, Ai Group repeats its position outlined above.

119. In response to the proposal for casuals to take personal leave '*without the fear of being terminated*', Ai Group understands this to be a proposed right for casual employees to be absent from work on an unpaid basis due to illness or injury. Proceeding on this basis, Ai Group repeats its position outlined at [111].

The ANMF ([108] – [113])

120. In response to the ANMF's proposal for an increased casual loading across modern awards, Ai Group repeats its position outlined earlier.

121. As to the proposed utility or appropriateness of an increased casual loading being used to disincentivise employers engaging employees on a casual basis, Ai Group repeats its position outlined at [117].

4. QUESTION 6

122. Question 6 is as follows:

> Is there evidence that use of individual flexibility arrangements undermines job security?

The ACTU ([25] – [29] and Recommendation 7)

123. Ai Group rejects the ACTU's assertion that IFAs are, by design, '*out of step*' with the *'Fair Work system'*.[66] To the contrary, in the context of a system which did away with Australian Workplace Agreements and Individual Transitional Employment Agreements, the availability of a mechanism for an employer and an employee to strike a mutually agreeable arrangement to vary the application of the terms of an award to meet their respective needs, is critical.

124. The ACTU's submission at [26] seeks to paint a misleading picture of the manner in which IFAs have been utilised, by selectively highlighting data from the General Manager's Reports (**FWC Reports**), which are suggestive of non-compliance with the requirements of the model flexibility term and/or conduct that may breach the relevant safeguards. Many of the examples provided by the ACTU do not go to issues of job security (as proposed to be defined by Ai Group).

125. Moreover, the ACTU's approach is unhelpful, since it detracts from a more appropriate focus on whether, as a general proposition, the use of IFAs (when being used as intended – i.e. in compliance with the model term) has the effect of undermining job security.

126. Ai Group strongly opposes the call in the ACTU's submission[67] for IFA provisions to be removed from all modern awards. IFAs are an important mechanism, which can in fact improve or facilitate access to secure work. Indeed, it is Ai Group's position that in this Review, the Commission should consider how the model

[66] ACTU submission dated 5 February 2024 at [25].

[67] ACTU submission dated 5 February 2024 at [29] and Recommendation 5.

flexibility term could be varied to improve its workability and ease the compliance burden on employers, in ways that render it more accessible.[68]

The SDA ([47] – [51])

127. The SDA's submission focuses primarily on one example IFA, the terms of which are described but do not appear as an attachment as indicated. It should not be given any weight. We cannot possibly verify the contents of the IFA or the circumstances in which it was implemented, because the employee and employer are not identified. In any event, it would not demonstrate widespread non-compliance with the model flexibility clause.

[68] February Submission at [186].

5. QUESTIONS 7 – 8

128. Question 7 is as follows:

> Having regard to the following modern award standard clauses:
>
> - Individual flexibility arrangements;
> - Consultation about major workplace change;
> - Consultation about changes to rosters or hours of work;
> - Dispute resolution;
> - Termination of employment; and
> - Redundancy.
>
> a. Are provisions of the standard clauses consistent with the new modern awards objective?
>
> b. Do any of the standard clauses negatively impact job security? If so, how?
>
> c. Do any or any part of the standard clauses:
>
> i. prevent or limit access to secure work?
>
> ii. enhance access to secure work?

129. Question 8 is as follows:

> Are there variations to the standard clauses that could improve access to, or remove barriers to accessing, the standard clauses by employees who are vulnerable to job insecurity?

Individual Flexibility Arrangements

<u>The ACTU ([30] – [38] and Recommendations 8 – 9)</u>

130. In response to the ACTU's submissions, we would firstly observe that the ability for both financial and non-financial benefits to be considered for the purpose of the better off overall test is intended in their design.[69] The ACTU asserts that IFAs that facilitate changes to work hours without the need for an employer to pay penalty rates that may otherwise be associated with that work '*is cause for*

[69] See illustrative example on p.137 of the Explanatory Memorandum to the *Fair Work Bill 2009* (Cth) and approach to the better off overall test outlined at p. 4 of the Fair Work Ombudsman '*Use of individual flexibility arrangements – Best Practice Guide*' (**FWO IFA Best Practice Guide**).

concern'. The following observation of the Full Bench of the Commission in this regard is apt:

> **[158]** Observations about the application of the BOOT and the matters which can be taken into account in making such an assessment are best made in the context of a particular case, rather than in the abstract…[70]

131. The ACTU's *'Recommendation 8'* contains six proposals as to how the standard term for individual flexibility arrangements should be varied.

132. The *first proposal* involves '*relocating the final subclause of the standard term as the first and supplementing it to alert readers to the NES right to request a flexible working arrangement*'. Although it is not clear that the proposed change is necessary, we would not oppose it; subject to further consideration being given to the specific form of words used.

133. Ai Group opposes the remainder of the proposals contained *in 'Recommendation 8'* on the basis they are unnecessary and/or would result in increased complexity and regulatory burden for employers seeking to utilise IFAs, contrary to ss.134(1)(f) and (g) of the Act. The basis for Ai Group's opposition to the remaining proposals is set out below.

134. The *second proposal - 'ensuring that an employer's "proposal" for an IFA includes a draft of the IFA'* - is unnecessary in circumstances where the standard clause already requires an employer's proposal to be in writing.

135. An additional requirement for an employer to prepare a draft IFA as a precursor to even being able to explore with an employee their interest in making an IFA, will increase the regulatory burden and may operate as a barrier to accessing IFAs. It is appropriate an employer only be required to expend the time and resources necessary to prepare a draft IFA once (and only if) an employee expresses interest in making an IFA in response to the written proposal.

[70] *Modern Awards Review 2012 – Award Flexibility* [2013] FWCFB 2170 at [58].

136. The *third proposal* would require that '*an employer's "proposal" for an IFA includes a statement to the effect that the employee is free to choose agree (sic) or not agree to the proposal; discuss, seek advice or be represented in relation to the proposal; and put forward an alternative*'.

137. This would increase compliance requirements on employers at the point of simply making a proposal. The proposed change is not necessary in circumstances where employees already have protections under the Act regarding IFAs and options available to them to seek the assistance of a union or other representative.

138. The *fourth proposal* entails '*ensuring that an employer's proposal for an IFA, and any IFA made, states the employer's assessment as to whether the IFA will result in any improvement to the regularity and predictability of the employee's work and income*'.

139. Employers and employees may wish to enter into IFAs for any manner of reason and may not be motivated either in part or at all by whether it results in an improvement to the regularity and predictability of the employee's work and income. Nor is there any mandate in the standard clause that this outcome be produced by an IFA. It would make the process of proposing an IFA more burdensome on employers. As the ACTU acknowledges, introduction of the requirement may also lead to disputation.[71] To some degree, an assessment of the anticipated outcome of an IFA may be somewhat subjective and therefore, may differ between reasonable minds.

140. Further, where the IFA would result in an improvement to the regularity and predictability of an employee's income, the standard clause already makes provision for this to be recorded in the context of the requirement for the terms of an IFA to *'set out how the agreement results in the employee being better off overall at the time the agreement is made than if the agreement has not been made*'.

[71] ACTU submission dated 5 February 2024 at [36].

141. The *fifth proposal* would involve unnecessarily adding to the length of the standard clause to direct parties to the dispute resolution procedure in the award.

142. It is not apparent why the proposed note is necessary, given IFAs are an *agreed* instrument entered into to meet the *genuine needs* of *both* parties which either or both parties remain free not to make if concerned by the proposal. Whether or not any such disagreement is properly characterised as being about a matter arising from the award to which the disputes procedure applies, would most appropriately be determined by the Commission in the circumstances of a particular matter.

143. The *sixth proposal* involves '*providing a capacity for the Commission to review an IFA and express an opinion about whether it continues to meet the BOOT and whether any expectations concerning improvements to regularity and predictability of hours and income has been realised'*.

144. Ai Group opposes the fourth proposal and as a corollary, the second area in which it is proposed the Commission have power to review IFAs. Subclause 5 of the standard term for IFAs requires an IFA to result in an employee being better off overall '*at the time the agreement is made*'. The effect of the sixth proposal would be to hold employers to a continuing obligation that does not exist under the standard term. Where concerns arise on either party's account as to whether an IFA is continuing to result in an employee being better off overall, they are free to terminate the arrangement on notice or at any time where mutually agreed. There is nothing to preclude an employee from seeking advice or support from the Fair Work Ombudsman, a union or other representative to assist them to evaluate their situation. The proposed change is neither necessary nor appropriate in the context of the MAO.

145. Ai Group also opposes the proposal in *'Recommendation 9'*.

146. Recommendation 24 of the Senate Select Committee on Work and Care (upon which *'Recommendation 9'* is based), recommends mandatory annual reporting of companies with over 20,000 employees in Australia to the Commission on

workplace practices concerning rostering and flexible work arrangements. This includes a recommendation of mandatory data collection by these companies of:

> …requests, including at store level, for roster changes and flexible working arrangements, and the percentage of changes to shifts that have been initiated by the employer within one week of the shift taking place. The data should:
>
> - include a collection of all requests, including those deemed 'informal', and detail whether these requests were approved, approved with modification, or denied;
>
> - provide information on the length of employment (up until the date of reporting) for that employee after their request was initially made; and
>
> - be provided in full to the Workplace Gender Equality Agency and published on the respective company's website.

147. The proposal would impose an enormous burden on employers when considered in the context of the many thousands of roster and shift changes that occur in large Australian businesses on an annual basis. Further, and as the ACTU acknowledges at [38] of its submission, the proposal is sub-optimal in the context of IFAs operating in relation to both awards and enterprise agreements. To address the issue by amendment to awards would result in a two-tier system where employers who are covered by both awards and agreements need to report on some IFAs and not others. The scale of burden and complexity that would flow from such a requirement is contrary to ss.134(1)(f) and (g) of the Act.

<u>The AMWU ([21] – [22])</u>

148. The AMWU submits that the model flexibility clause in all awards should contain an additional provision giving an employee seven working days to enable them to seek advice from a union about a proposed IFA. It points to a similar clause contained in the TCF Award.[72]

[72] AMWU submission dated 5 February 2024 at [21] – [22].

149. The modification to the standard clause made at clause 5.10 of the TCF Award was a bespoke change made by the Full Bench of the Australian Industrial Relations Commission in recognition of the nature of employment in that industry. At the time of determining to make the change, the Full Bench stated: (emphasis added)

> **Award Flexibility**
>
> **[17]** With one exception we have not found it necessary to modify the substance of the model award flexibility clause in any of the drafts. To put the intended operation of the clause beyond doubt we have included the words "Notwithstanding any other provision of this award" at the start of the model clause. The draft award flexibility clause in the exposure draft for the textile, clothing, footwear and associated industries contains some modifications directed to the nature of employment in that industry. They deal with translation and time for consideration of proposed agreements.[73]

150. The AMWU does not advance any merit argument as to why such a protection is necessary in the context of awards more broadly. The additional requirement will operate as an impediment to an employer and employee being able to reach agreement quickly where this is mutually desired – and indeed, could even operate against an employee's interests where they seek to enter an IFA for pressing reasons (noting clause 5.10 of the TCF Award does not permit an employee to waive this period). There is also no apparent reason why any opportunity to seek advice should be limited to obtaining advice from *unions* (As opposed to other types of representatives).

151. Ai Group opposes the AMWU's proposed change.

Consultation about Major Change

The ACTU ([39] – [43] and Recommendation 10)

152. The ACTU proposes various changes to the model consultation clause about major change. We deal with each in turn.

[73] *Award Modernisation* [2008] AIRCFB 717.

153. *First,* the ACTU argues that the model clause should identify a *'reduction in job security'* as a *'significant effect'*. This would have the consequence of requiring an employer to consult an employee where they have made a *'definite decision'* to introduce a *'major change'* that is likely to result in a reduction in job security.[74]

154. We oppose this proposal for reasons that include the following:

(a) The proposal would result in the introduction of a new, undefined, term in modern awards. Further, as demonstrated by the submissions advanced in these proceedings, there are differing views amongst key industrial organisations as to what the term means. Its utilisation in an award is likely to create ambiguity and uncertainty, and to potentially result in disputes between parties as to when it applies in practice.

(b) If one were to adopt the unions' conception of *'job security'* (that is, that it relates to the *'underlying concepts relating to the choice to enter into or remain in work that provides regularity and predictability in type of employment, hours of work and income'*); a reduction in job security may not always have a *'significant effect'* on an employee. For example, the introduction of new technology relating to how an employee's work will be scheduled may, in theory, mean that there is greater uncertainty for the employee as to their hours of work. However, in practice, it is unlikely to have a significant effect on them, because it will not impact their start and finish times.

(c) The definition of *'significant effects'* in the model term as currently drafted may, in some cases, already apply in the circumstances contemplated by the ACTU. For example, it expressly contemplates *'alteration of hours of work'*.

[74] ACTU submission dated 5 February 2024 at [40].

(d) Moreover, the aforementioned definition of *'significant effects'* is not an exhaustive one. Thus, where an employee's job security will be significantly affected by a major change, an employer would potentially already be required to consult in accordance with the model term.

(e) We oppose any proposed expansion of the obligation to consult arising from the model term. The clause imposes various onerous requirements on employers, that often require the dedication of significant time and resources. The regulatory burden associated with complying with the term should not be compounded.

(f) It is critical that employers are able to efficiently implement changes to their operations. An expansion of the scope of the consultation clause may result in a further incursion on an employer's prerogative to effectively introduce necessary alterations to its practices. At the very least, it would serve to prolong and potentially delay the execution of business-critical decisions. This in turn can impact the business' efficiency, productivity and competitiveness.

155. *Second,* the ACTU contends that the current characterisation of the changes that would give rise to a requirement to consult as being *'major'* should be removed.[75]

156. Plainly, this is intended to inappropriately increase the scope of matters about which an employer is required to consult its employees about changes that it seeks to make to its operations. For the reasons articulated at paragraphs (e) – (f) above, we would oppose any such change. It is critical that any award-derived obligation to engage in a process of consultation strikes a fair balance between the interests of employers and employees.

[75] ACTU submission dated 5 February 2024 at [40].

157. In any event, it is not clear that the proposal would achieve the objective sought by the ACTU. Ultimately, irrespective of the nature of the relevant change, an employer is required to consult only if it would have a *'significant effect'* on an employee (or employees). It is axiomatic that a change that is not *'major'* is less likely to have a *'significant'* effect on employees vis-à-vis one that is *'major'*.

158. *Third,* the ACTU submits that additional consultation provisions akin to clause 29 of the *Security Services Industry Award 2020* and the *Cleaning Services Award 2020* should be *'considered in other industries where tendering / contracting as a service provider is common'*. In addition, such clauses are also said to be suitable *'where the employer concerned is a labour hire company'*.[76]

159. The ACTU has not provided any examples of industries in which it says that tendering or contracting is common and to that end, it is unclear precisely which awards would be the subject of its proposal.

160. In any event, labour hire arrangements plainly operate more broadly, across large parts of the economy. It cannot lightly be assumed that a provision comparable to those mentioned by the ACTU would impose a workable or tolerable burden on employers. Such an assessment certainly cannot be made without detailed evidence of the labour hire industry and a more rigorous opportunity to respond to the ACTU's proposition than what is possible through this process.

161. In the circumstances, the simplistic replication of the above award terms in other awards, or in relation to labour hire employers, should not be adopted.

162. *Fourth,* the obligation to consult should arise at an earlier stage than the existing requirement to consult when a *'definite decision'* has been made, per the ACTU.[77]

[76] ACTU submission dated 5 February 2024 at [41].

[77] ACTU submission dated 5 February 2024 at [42].

163. We strongly oppose this proposal; in part, for the reasons set out above at paragraphs [154(e]) – [154(f)].

164. Moreover, it would be entirely inappropriate to require employers to consult in respect of *potential* changes, or changes that the employer is *'seriously considering'*. The process of implementing major changes in a workplace generally commences with an employer giving detailed consideration to one or more options, including their various implications. Often, some of the factors being considered are confidential or otherwise sensitive in nature. An employer should not be required to engage with its workforce and representatives in that context.

165. Further, a premature requirement to advise employees and their representative(s) of consideration being given to a potential change, or various potential options for change, would, in many cases, put bluntly, do more harm than good. It may create unease and concern amongst the workforce about a change that the employer has not yet decided to implement and indeed, may abandon, irrespective of the outcome of the consultation process. Similarly, an employer would be required to dedicate resources to engaging in consultation about a change that ultimately, it may decide not to pursue, regardless of the employees' views about it.

166. Contrary to the ACTU's assertions, the existing framework does provide employees with a meaningful opportunity to seek to influence (or indeed, alter) a decision made by an employer to implement a workplace change. It does so in a way that ensures that the consultation process is conducted by reference to a clear proposal that the employer in fact wishes to pursue.

167. *Fifth,* the ACTU says that awards should provide for industry-level consultation about job security.[78]

[78] ACTU submission dated 5 February 2024 at [43].

168. There is in our view a very real question as to whether s.139(1)(j) of the Act would permit a provision of the nature contemplated, given that award terms generally regulate the relationship between an employer and employee. This can be seen from the list of matters identified in s.139(1) of the Act.

169. However, notwithstanding any such technicalities, measures that facilitate consultation at the industry-level are best dealt with outside the context of the minimum safety net. It cannot be said that it is *necessary* for an award to include such a term. There already exist various forums, such as the National Workplace Relations Consultative Committee, through which such discussions could occur. Moreover, where relevant, industrial parties could, at any time, come together to discuss sector-wide issues.

<u>The ASU ([42] – [44])</u>

170. The ASU submits that the model clause concerning major changes should require an employer to consult *'at the earliest opportunity'*, before a *'definite decision'* has been made. We oppose this argument and refer to the submissions made in response to the same contention advanced by the ACTU.

171. The ASU also submits that the clause should impose an obligation on employers *'to take practical steps to mitigate the impact of change on employees'*. Specifically, in the context of redundancy, *'this must involve exhausting all other options before forcibly terminating employees'*.

172. The proposed change would significantly exacerbate the regulatory burden flowing from the extant clause on employers, in circumstances where:

    (a) In many cases, it may not be feasible for the employer to take any steps to alleviate the implications of the proposed change on the affected employees.

    (b) The suggested requirement would have the effect of requiring an employer to take steps that would undermine, partly or wholly, the objective of the proposed change. For example, it may limit the extent to which the change achieves the intended productivity improvements.

(c) By virtue of s.389(2) of the Act, which defines a *'genuine redundancy'* in the context of the unfair dismissal framework, employers typically take steps to assess whether an employee can reasonably be redeployed, where they would otherwise be terminated by reason of redundancy. It is not necessary to introduce an award-derived obligation in this regard, given the availability of the unfair dismissal regime and the specific treatment therein to the issue of redundancies.

173. Ai Group would oppose any alteration to the model clause to give effect to the ASU's submission.

Consultation about Hours of Work and Rosters

The ACTU ([44] – [52] and Recommendations 11 – 12)

174. The ACTU also proposes various changes to the model consultation clause about regular rosters and ordinary hours of work. We respond to each as follows.

175. *First,* the ACTU proposes that the standard term should specify that the employer must provide affected employees with information about *'whether the change is expected to be permanent or temporary, and if the latter – the duration'*.[79]

176. Employers are often not in a position to anticipate the period of time over which proposed changes to rosters or hours of work will apply, including whether they are temporary or permanent. We anticipate that in many cases, it would be impracticable to comply with a requirement to provide this information to employees.

177. *Second,* the ACTU argues that the information to be provided *'should include … the effect of the change on the employees' earnings'*.[80]

[79] ACTU submission dated 5 February 2024 at [50].

[80] ACTU submission dated 5 February 2024 at [50].

178. We would oppose a variation to this effect. It would significantly increase the regulatory burden imposed by the provision on employers. This would be particularly pronounced if the clause required (expressly or, in effect) an employer to calculate the precise impact that the proposed change would have on an employee's earnings.

179. Indeed, in some cases, it may not be feasible to assess, with certainty, the impact that the proposed change would have on an employee's earnings. For example, a new roster may involve some inherent uncertainty as to the employee's precise hours of work, or their hours may fluctuate over time.

180. In other instances, the information provided by an employer about a proposed change may enable an employee to make the requisite assessment themselves (e.g. where an employee will no longer be rostered to perform work on shifts or at other times that attract penalty rates, it may be reasonably clear that the employee will experience a reduction in earnings). Where an employee is unable to do so, they would be at liberty to ask for this information through the consultation process.

181. *Third,* the ACTU suggests that awards should in effect require that employers make *'some effort to ensure that a proposition being put to an employee [during a consultation process] is comprehensible'*.[81]

182. Award provisions do not generally impose such requirements on employers, except in the context of certain industries or sectors where a specific need has been identified.[82] The Commission should not deviate from this approach. Where an employee requires assistance with comprehending information provided by their employer, they are of course at liberty to request assistance from their employer and / or a representative.

183. *Fourth,* the ACTU contends that awards should provide a process whereby employees whose hours of work are *'irregular, sporadic or unpredictable'* are *'given an opportunity to express their interest in working hours which are regular*

[81] ACTU submission dated 5 February 2024 at [50].

[82] For example, the TCF Award.

and predictable'. Further, employers should be required to *'inform those employees when such hours [are] available to them (even if only on a temporary basis), and what payment they would attract'*.[83]

184. We would oppose any such change. These are not matters that should be regulated by awards. Further, they would unfairly increase employers' compliance burden.

185. Employees can, at any time, express a desire to work a different pattern of hours. It is not necessary for an award to give them the opportunity to do so.

186. Additionally, employers should not be required to inform employees when the relevant hours are available. An employer should be at liberty to elect how it fills a position, taking into account various matters, including the skills and competencies required. Considerations associated with the efficient and productive performance of work will be paramount in an employer's consideration of how work is allocated. This should not be disturbed.

187. *Fifth,* the ACTU proposes that the issue of whether information should be provided in writing be explored in these proceedings.[84]

188. We would strongly oppose any requirement to provide the requisite information in writing. It remains the case that such an obligation *'would impose an unwarranted regulatory burden on business'*.[85]

189. This is particularly relevant in the context of this model clause, which requires an employer to consult in every instance that it *'proposes to change the regular roster or ordinary hours of work of an employee'*. In a medium or large enterprise within which it is necessary to alter rosters and hours with some frequency in order to, for example, respond to changing operational demands, a requirement to provide information in writing would be particularly burdensome.

[83] ACTU submission dated 5 February 2024 at [51].

[84] ACTU submission dated 5 February 2024 at [52].

[85] *Consultation clause in modern awards* [2013] FWCFB 10165 at [83].

The AMWU ([26])

190. The AMWU argues that the model term concerning changes to hours of work and rosters should apply to the *'host'* in respect of labour hire employees.

191. We would strongly oppose the introduction of such an obligation on users of labour hire arrangements. It would seek to undermine some of the very flexibilities that employers utilising labour hire arrangements need to access.

192. Further, the consultation obligations would, where relevant, apply to the labour hire employer. Employees would therefore have an opportunity to express any views or concerns to them.

The ASU ([46] – [50])

193. The ASU makes various factual assertions about the operation of the consultation clause concerning rosters and hours of work, which we oppose. Specifically, we do not accept that employers *'rarely genuinely consult with their employees about roster changes'*.[86]

194. Further, the ASU's submission proceeds on the basis of a misapprehension about the interaction between the model clause and award terms that expressly concern *'scheduling of work or the giving of notice'*.[87] The award requires that such provisions be read *with* the consultation clause. Thus, even where an employer has an express right under an award to effect a change to an employee's ordinary hours or roster, they must also comply with the consultation clause.

195. We oppose the ASU's proposal that the model term require that compliance with it *'is a precondition'* to a change being made.[88] There are various existing mechanisms available to employees if an employer does not comply with the consultation clause or if the employee perceives that they have not done so

[86] ASU submission dated 5 February 2024 at [48].

[87] ASU submission dated 5 February 2024 at [48].

[88] ASU submission dated 5 February 2024 at [50].

adequately. This includes instituting a dispute in accordance with the procedure set out in awards.

196. We also strongly oppose the notion that 14 days' notice should be given for all roster changes. There are countless examples of why employers may need to change rosters within a shorter time period, including to account for unexpected staff absences or operational requirements. In some cases, employers would be simply unable to respond to critical business requirements if such a limitation were introduced.

197. Many rostering provisions in awards are overly restrictive. The level of flexibility available in fact needs to be increased.

The Dispute Resolution Procedure

<u>The ACTU ([53] – [60] and Recommendations 13 – 16)</u>

198. We agree with the ACTU that issues associated with the issue of dispute resolution training leave for union delegates and the role that they may play in the context of disputes should be dealt with through proceedings recently commenced about delegates' rights terms (AM2024/6).[89] The Commission should not express any views of the nature described by *'Recommendation 13'* if it does not deal with the substance of these issues.

199. In addition, the ACTU argues that the model clause should be varied to *'specify some of the powers that the Commission may choose to exercise in resolving a dispute, independent of the parties' consent'*. Its proposal is said to be supported by two propositions; that *'an employer's position in dispute resolution may be more flexible'* if it understands that the dispute may be the subject of *'external scrutiny'* and that it may *'enable'* the Commission to *'take a more active role in dispute resolution'*.[90]

[89] ACTU submission dated 5 February 2024 at [54] – [55].

[90] ACTU submission dated 5 February 2024 at [57].

200. A clause that is intended to influence how an employer responds to a dispute cannot be said to be *'necessary'* for the purposes of s.138 of the Act. Further, the Commission is well-acquainted with the powers that it can exercise in the context of a dispute. We do not envisage that their identification in the award would alter the substantive role that it plays in such matters.

201. The ACTU also suggests that consideration is given to *'whether job security may be enhanced through the capacity to resolve disputes that extend beyond matters arising under the modern award or NES'*.[91]

202. It would not be appropriate to expand the scope of the dispute resolution procedure to disputes concerning matters that fall beyond the scope of the safety net. The Commission has consistently refused to include award terms that purport to regulate above-safety net terms and conditions. The same approach should be applied to the dispute resolution clause.

Termination of Employment

The ACTU ([61] – [66] and Recommendations 17 – 18)

203. The ACTU's submission identifies that there may be awards in which provisions requiring an employer to return an employee to their usual or '*home*' location upon termination and / or for the notice period to not commence until the employee has returned should be introduced, but does not identify which award(s) or the precise variations that may be appropriate for any other awards. Ai Group reserves its position to respond to any award-specific proposals should they arise during the consultation stage or subsequently.

204. Ai Group opposes *'Recommendation 17'*. Whilst true that Subdivision D of Division 3, Part 2-3 of the Act does not expressly prohibit the inclusion of terms that interact with the unfair dismissal jurisdiction, nor is it a kind of term that may[92] or must[93] be included, or which is expressly contemplated as being included by

[91] ACTU submission dated 5 February 2024 at [60]

[92] Subdivision B of Division 3, Part 2-3 of the Act.

[93] Subdivision C of Division 3, Part 2-3 of the Act.

Part 2-2 of the Act; such a term may only be included to the extent necessary to achieve the MAO.[94] Even in the context of the change to that objective made by s.134(1)(aa), the ACTU's proposal is not necessary in the context of the unfair dismissal jurisdiction which includes as its primary remedy, reinstatement.[95]

205. Recommendation 17 would further add to the existing regulatory burden on employers in circumstances where the Act already contains robust mechanisms for challenging the reason(s) for which an employee's employment is terminated (and noting also that dismissal is not a pre-requisite for making an application in respect of alleged contraventions of the general protections contained in Part 3-1 of the Act).

206. The proposal also raises the spectre of whether it would result in an employer having breached an award where an employer's stated reason for termination may not be held to be *'valid'* or a redundancy not '*genuine'*. This would operate particularly unfairly given the terms '*valid reason for termination*' and '*genuine redundancy*' are nuanced and have been the subject of vast consideration by the Commission. There is real potential for differences in assessment as to whether a reason is *'valid'* or a redundancy *'genuine'*.

207. Further, despite the ACTU's assertion that Commission intervention at the point of the employee being notified of the dismissal would obviate the need to make unfair dismissal applications, there does not appear to be anything in the Act that would prevent an employee from doing so and thereby subjecting the employer to two sets of proceedings arising out of the same factual matrix.[96]

208. *'Recommendation 18'* is also opposed by Ai Group. It is based on the premise that it would deter employers from terminating employees' employment '*at will'*. The ACTU points to clause 33.4(b) of the *Black Coal Mining Industry Award 2020* as an appropriate mechanism to be included in awards to achieve this. However:

[94] s.138 of the Act.

[95] s.390(3)(a) of the Act.

[96] See Subdivision B of Division 3, Part 6-1 of the Act.

(a) Two of the four circumstances in clause 33.4(b) relate to retirement of an employee at or after age 60, or death of the employee. These are not examples of employment ending by way of termination '*at will*' by an employer and accordingly, any proposal to require an employer to pay out personal/carer's leave entitlements for the purpose of disincentivising an employer to terminate an employee's employment in these circumstances is illogical.

(b) A third circumstance in clause 33.4(b) relates to retrenchment. By definition, an employee's employment terminates for this reason when the employer no longer requires the job done by the employee to be done by anyone (except where due to the ordinary or customary turnover of labour) or because of insolvency or bankruptcy.[97] The key motivation for termination in these circumstances is evidently not an employee's ill health, and nor is it appropriate to impose additional costs on employers facing downsizing or the threat of closure.

(c) The fourth circumstance referred to in clause 33.4(b) is termination of employment by the employer because of ill health. The ACTU's proposal is ill conceived, in so far as the effect of the temporary absence provision in the Act is to protect employees from having their employment terminated due to illness or injury for so long as the employee remains on paid personal/carer's leave (provided the employee complies with any applicable evidence and notice requirements).[98] Accordingly, so long as the employee has paid personal/carer's leave that they are using due to ill health, their employment cannot be terminated. Only once an employee has exhausted all of their paid personal/carer's leave entitlements and

[97] s.119(1) of the Act.

[98] Section 352 of the Act prohibits an employer from dismissing an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations. Regulation 3.01 of the *Fair Work Regulations 2009* (Cth) (**Regulations**) prescribes kinds of illness or injury for the purpose of s.352 of the Act (Reg 3.01(1)). The effect of r. 3.01(5)(b) is that an employee's absence only ceases to be temporary beyond a period of 3 months (or sequence of absences in a 12-month period totalling 3 months) where '*the employee is not on paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act for the duration of the absence'*.

persists on unpaid leave due to illness or injury for a period that exceeds 3 months (or the equivalent cumulative period) may an employer lawfully terminate employment. However, in these circumstances the employee would not have any paid personal/carer's leave capable of being paid out on termination.

209. The proposal would impose an enormous cost impost on employers, which for the reasons outlined above is neither necessary nor appropriate in the context of the MAO. Paid personal/carer's leave should be utilised only for the purpose for which it is intended and not to create a windfall on termination of employment for employees.

The AMWU ([23] – [24]

210. Ai Group opposes the AMWU's position and relies on its submissions in response to the ACTU's *'Recommendation 17'*.

Redundancy

The ACTU ([67] – [73] and Recommendation 19)

211. Ai Group strongly objects to the proposal in *'Recommendation 19'*, which involves expanding redundancy entitlements to employees of small business employers under the terms of both awards and the NES.

212. Such a change is neither compelled by nor consistent with the insertion of s.134(1)(aa) into the MAO. In Ai Group's submission, the new s.134(1)(aa) is directed towards the need to improve or enhance access to (including the availability of) employment that does not entail an inherent risk of being lost.[99] It does not command any generalised improvement in redundancy entitlements of the nature proposed, upon loss of employment.

213. The small business redundancy pay exemption is a long-standing feature of Australia's system of safety net entitlements. As explained in the Revised Explanatory Memorandum (**REM**) to the *Fair Work Legislation Amendment*

[99] 5 February Submission at [29].

(Closing Loopholes) Bill 2023 (Cth) (which contained an amendment to address an anomaly which arises in the context of a business downsizing from a larger business to a smaller business due to insolvency): (emphasis added)

> 62. The pre-existing small business redundancy exemption is a longstanding feature of the workplace relations framework under the FW Act. It encourages employment by small businesses by relieving them of NES redundancy pay obligations, which can be a significant contingent cost of employing staff. To qualify for the exemption, businesses must employ fewer than 15 staff.[100]

214. Viewed in this way, the small business redundancy pay exemption may be characterised as improving access to secure forms of work insofar as it negates small business employers being deterred from engaging employees on a permanent basis, due to concerns regarding the impost of redundancy pay obligations attached to permanent employment.

The UWU ([27] – [31])

215. The exemption to an employer being required to pay redundancy pay where an employee is terminated due to the ordinary and customary turnover of labour is also a long-standing feature of redundancy pay entitlements in Australia. As outlined above, the inclusion of s.134(1)(aa) in the MAO does not command any generalised improvement in redundancy entitlements upon loss of employment. It is neither required not appropriate for that standard to be disturbed in the context of this Review.

216. To the extent that the union complains about the term being *'confusing*', as acknowledged by the ASU, the issue relates to the NES rather than awards.

Model Job Security Term

The ASU [40] – [41]

217. The ASU proposes that awards be varied to include a *'commitment to job security'* model term, which would impose an *'obligation on employers to promote job security when exercising their rights under the award'*.

[100] REM, page 14 at [62].

218. The proposed variation seeks to fetter the exercise of employers' rights under awards to, for example, change employees' hours of work, rostering arrangements and the like. The imposition of a blanket requirement of this nature would be plainly inappropriate and strongly opposed by Ai Group. The impact on employers would potentially be profound, as the scope within which they may exercise their discretion in respect of various matters would be significantly curtailed.