

Australian Industry Group

Modern Awards Review 2023 – 24
Making Awards Easier to Use

Supplementary Submission
(AM2023/21)

3 April 2024

Ai
GROUP

AM2023/21 MODERN AWARDS REVIEW 2023 – 24

MAKING AWARDS EASIER TO USE

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) has previously filed submissions in the ‘*Making Awards Easier to Use*’ (**MAEU**) stream of the Award Review 2023 - 24 (**Review**), on 22 December 2023 ([December Submission](#)) and 19 February 2024 ([February Reply Submission](#)).
2. Our December Submission relevantly proposed (amongst other things) numerous variations to the *Children’s Services Award 2010* (**CS Award**).
3. Ai Group’s proposed variations to the CS Award were the subject of a consultation conference before His Honour, Justice Hatcher on Wednesday, 20 March 2024 (**MAEU Conference 6**).
4. During MAEU Conference 6, Justice Hatcher invited Ai Group to file further submissions in relation to the following matters:
 - (a) Ai Group’s proposal regarding variations to the roster change provisions in the CS Award;¹
 - (b) Ai Group’s proposal regarding additional flexibility in the CS Award to take into account client cancellations;² and
 - (c) Whether Ai Group’s proposed variation to the CS Award that would enable the requirement to ‘*post*’ a roster to be satisfied by using electronic means, should be raised more generally, in respect of other awards.³
5. This submission addresses the above matters.

¹ [December Submission](#) at [418] – [425].

² [December Submission](#) at [426] – [428].

³ [December Submission](#) at [437] – [439].

6. We also file, attached to this submission, a revised draft determination. It reflects certain revisions made to the draft determination we filed on 22 December 2024, consistent with this submission.

2. NOTICE OF ROSTER CHANGES FOR PART-TIME EMPLOYEES

7. The CS Award currently permits changes in the days part-time employees will work, or start and / or finish times, by agreement. Where agreement cannot be reached, an employer may change an employee's days of work with 7 days' advance notice.⁴ An employer is exempt from the requirement to provide the full 7 days' notice due to an emergency outside of the employer's control.⁵ 'Emergency' is confined to a situation or event that poses an imminent or severe risk to the persons at an education and care service premises (such as a fire), or a situation that requires the premises to be locked down (for example, an emergency government direction).⁶
8. In the December Submission, we proposed variations to the CS Award to expand the circumstances in which an employer is exempt from providing the full 7 days' notice.⁷ We submitted that the exemption should also permit an employer to treat as an emergency a situation where an unexpected staff absence will compromise its ability to meet relevant regulatory requirements regarding staffing levels.⁸ In this regard, we note that one component of the National Quality Framework (being Australia's system for regulating early learning and school age care) concerns mandatory minimum educator-to-child ratios, which must be maintained at all times.⁹ Clearly, an unexpected staff absence may jeopardise an employer's ability to meet these ratios on any given day.

⁴ Clause 10.4(d)(ii) of the CS Award.

⁵ Clause 10.4(d)(iii) of the CS Award.

⁶ Clause 10.4(d)(v) of the CS Award.

⁷ [December Submission](#) at [418] – [425].

⁸ [Transcript of proceedings](#), 20 March 2024 at PN 17; December Submission at [420].

⁹ See [Educator to child ratios | ACECQA](#)

9. During MAEU Consultation 6, Justice Hatcher invited Ai Group to propose an alternate form of words directed more specifically towards this circumstance, and also having regard to the potential for it to result in a part-time employee being rostered (without their agreement) on days of work which are not part of their agreed, usual pattern of work.¹⁰
10. In relation to the concern regarding a part-time employee potentially being rostered to work on a day that is not their normal work day,¹¹ we respectfully submit that the ability for an employer to roster a part-time employee on a different day (or days) to their usual work day (or days) already exists under the terms of the CS Award.¹² Thus, we do not seek to introduce a new right in this regard. Rather, our proposal is simply to *expand* the notion of what constitutes ‘*an emergency outside of the employer’s control*’¹³, so as to enliven the flexibility in clause 10.4(d)(iii) of the CS Award in an additional circumstance.
11. We otherwise rely on our December Submission in support of this proposal.¹⁴ Plainly, the consequences of failing to meet the relevant regulatory requirements on a given day are significant for employers and the children in their care. Employers should be permitted to make a change to the roster without the full 7 days’ notice, to ensure they can continue to meet the relevant regulatory requirements.
12. We have proposed alternate variations to the CS Award to address this. These are set out at paragraphs [31] and [34] of the revised draft determination attached to this submission.

¹⁰ [Transcript of proceedings](#), 20 March 2024 at PNs 56-57.

¹¹ [Transcript of proceedings](#), 20 March 2024 at PNs 19 – 35.

¹² Clause 10.4(d)(iii) of the CS Award.

¹³ Clause 10.4(d)(iii) of the CS Award.

¹⁴ [December Submission](#) at [418] – [425].

3. CLIENT CANCELLATIONS

13. In our December Submission, we identified that employers covered by the CS Award may benefit from increased flexibility with respect to how staff who are no longer required for a shift (or part of a shift) due to client cancellations, may be productively utilised, and proposed this matter be the subject of further discussion before the Commission before any specific proposal was advanced.¹⁵
14. Following discussion of the proposal during MAEU Consultation 6,¹⁶ Justice Hatcher invited Ai Group to file a more detailed proposal in relation to a proposed variation to the CS Award to address client cancellations.¹⁷
15. With the benefit of the discussion during MAEU Conference 6 and an opportunity to consult further with relevant affiliates, Ai Group no longer presses this matter and accordingly does not file a proposal concerning the issue.

4. THE REQUIREMENT TO 'POST' A ROSTER

16. Clause 21.7(a) of the CS Award provides that '*[a]n employer will post a legible roster at a place readily accessible to employees indicating the rostered hours of work*'.
17. In its December Submission, Ai Group proposed varying the award to make clear that this obligation can be satisfied by an employer making a roster available to employees by electronic means.¹⁸
18. During MAEU Consultation 6, His Honour made the following observation regarding this provision:

JUSTICE HATCHER: ...this seems to me to be a provision which might actually apply to a number of awards, not just this award. So, I'm just wondering whether it should be raised in a wider context. Because actually, when I looked up some other awards about this proposal I was surprised to see how many of them still required a physical placing

¹⁵ [December Submission](#) at [426] – [428].

¹⁶ [Transcript of proceedings](#), 20 March 2024 at PNs 71 – 111.

¹⁷ December Submission at [426] – [436]; [Transcript of proceedings](#), 20 March 2024 at PN 112.

¹⁸ December Submission at [437] – [439].

of a roster on a noticeboard. So, perhaps the Ai Group might consider advancing this proposal as a general award change rather than specifically for this award.¹⁹

19. Following MAEU Consultation 6, Ai Group has reviewed the other awards being considered in the MAEU stream of the Review and has identified the following similarly problematic provisions:

(a) Clause 25.5(a) of the *Social, Community, Home Care and Disability Services Industry Award 2010*, which provides:

The ordinary hours of work for each employee will be displayed on a fortnightly roster in a place conveniently accessible to employees. The roster will be posted at least two weeks before the commencement of the roster period.

(b) Clause 15.3(c) of the *Restaurant Industry Award 2020*, which provides:

The employer must post the roster in a conspicuous place that is easily accessible by the employees.

(c) Clause 15.5(c) of the *Hospitality Industry (General) Award 2020*, which provides:

The employer must post the roster in a conspicuous place that is easily accessible by the employees.

20. In our submission, the above clauses are ambiguous and uncertain in the same sense as clause 21.7(a) of the CS Award, in that it is not clear whether the award-derived obligation can be satisfied by an employer making a roster available to employees by electronic means.

21. Requiring an employer to ‘post’ a hard copy roster is unduly restrictive in the context of contemporary workplaces. In practice, it has become increasingly common for employers and employees in a range of industries to utilise electronic means of communication or otherwise make information accessible via electronic means, including email, intranet and smart phone applications. To the extent that awards do not permit rosters to be made accessible by electronic means, they do not reflect contemporary work practices.

¹⁹ [Transcript of proceedings](#), 20 March 2023 at PN 142.

22. It is highly likely that there are other awards, in addition to those identified above, which do not permit, or are ambiguous as to whether they permit, rosters to be made available to employees using electronic means.
23. To ensure the modern award system reflects contemporary work practices, the Commission should vary all awards which contain a requirement to '*post*' or '*display*' a roster to clarify that electronic means can be used. We propose to separately file a list of other awards that contain such provisions shortly.

MA000120 [insert print number]



REVISED DRAFT DETERMINATION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

Modern Awards Review 2023-24

(AM2023/21)

CHILDREN'S SERVICES AWARD 2010

[MA000120]

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O'NEILL
COMMISSIONER TRAN

SYDNEY, [DATE]

Modern Award Review 2023-24 – Children's Services Award 2010

A. Further to the decision issued on [insert date],¹ it is ordered that the *Children's Services Award 2010*² be varied by:

Chapters 5 & 16C

1. Deleting clause 10.4(e) and replacing it with the following:

- (e) An employer is required to roster a part-time employee for a minimum of two consecutive hours on any shift, provided that:
 - (i) An employer and a part-time employee can agree to reduce the minimum period prescribed by this clause; and,
 - (ii) This clause does not apply where the employee is required by the employer to attend a meeting or participate in training, however the employee is not required to attend a designated workplace for this purpose.

¹ [citation].

² MA000120.

2. Deleting clause 10.5(c) and replacing it with the following:
 - (c) A casual employee will be paid a minimum of two hours pay for each engagement, provided that:
 - (i) An employer and a casual employee can agree to reduce the minimum period prescribed by this clause; and
 - (ii) This clause does not apply where the employee is required by the employer to attend a meeting or participate in training, however the employee is not required to attend a designated workplace for this purpose.

Chapter 6

3. Renumbering clause 19.3 to 19.4.
4. Inserting a new clause 19.3 as follows:
 - 19.4** Notwithstanding anything else in this award, where an employee's ordinary hours are averaged over a period of time, an employee may be paid for the average number of ordinary hours attributed to the relevant pay period.

Chapter 7

5. Inserting "4-weekly" after "fortnightly" in chapeau of clause 19.2.

Chapter 8

6. Deleting clause 7.1(e) and replacing it with:
 - (e) annual leave loading; or
 - (f) pay periods.

Chapter 10

7. Deleting the words "The total minimum weekly rate of wages payable to persons employed pursuant to this award will be as set out in the following table." from clause 14.1 and replacing them with "The minimum hourly and weekly rates payable to employees in each classification level under this award are set out in the following table."
8. Renumbering clauses 14.2 to 14.8 as 14.3 to 14.9.

9. Inserting a new clause 14.2 as follows:

14.2 An employer is taken to satisfy its obligation to pay a full-time employee for a 38 ordinary hour week where the employer pays an amount that is equivalent to the minimum weekly rate prescribed by clause 14.1 or the minimum hourly rate multiplied by 38.

Chapter 11

10. Inserting the words “(including by electronic means)” into clause 7.4(a) after the words “written proposal”.
11. Inserting the words “(including by electronic means)” into clause 7.7(a) after the words “in writing”.
12. Inserting the words “, or confirmed using electronic means,” into clause 7.7(b) after the word “signed”.
13. Inserting the words “(including by electronic means)” into clause 7.11(a) after the words “written agreement”.
14. Inserting the words “(including by electronic means)” into clause 7.11(b) after the words “written notice”.
15. Inserting the words “(including by electronic means)” into the note following clause 7.11 after the words “written notice”.
16. Inserting the words “(including by electronic means)” into clause 8.2 after the words “in writing”.
17. Inserting the words “(including by electronic means)” into clause 10.4(c) after the words “in writing”.
18. Inserting the words “(including by electronic means)” into clause 14.2(b)(i) after the words “in writing”.
19. Inserting the words “(including by electronic means)” into clause 14.6(d) after the words “in writing”.
20. Inserting the words “(including by electronic means)” into clause 20.3(a) after the words “in writing”.
21. Inserting the words “(including by electronic means)” into clause 24.4(c) after the words “written notice”.
22. Inserting the words “(including by electronic means)” into clause 24.4(d) after the words “written notice”.
23. Inserting the words “(including by electronic means)” into clause 24.4(f)(i) after the words “in writing”.

24. Inserting the words “(including by electronic means)” into clause 24.4(h) after the words “in writing”.
25. Inserting the words “(including by electronic means)” into clause 24.6(a) after the words “in writing”.
26. Inserting the words “(including by electronic means)” into clause 24.7(a) after the words “written notice”.
27. Inserting the words “(including by electronic means)” into clause 24.8(a) after the words “in writing”.
28. Inserting the words “, or confirmed using electronic means,” into clause 24.8(b)(ii) after the word “signed”.
29. Inserting the words “(including by electronic means)” into clause 24.9(c) after the words “in writing”.
30. Inserting the words “, or confirmed using electronic means,” into clause 24.9(e) after the word “signed”.

Chapter 16A

31. Deleting clause 10.4(d)(iii) and replacing it with:
 - (iii) The employer is not required to provide the full 7 days’ notice of change of the days an employee is to work where the employer makes the change as a result of:
 - (A) an emergency outside of the employer’s control; or
 - (B) the need to meet State or Territory regulatory requirements in circumstances where another employee’s is unexpectedly absentee from work.
32. Deleting the cross-reference in clause 10.4(d)(iv) to clause 10.4(d)(iii) and replacing it with a cross-reference to clause 10.4(d)(iii)(A).
33. Deleting the cross-reference in clause 10.4(d)(v) to clause 10.4(d)(iii) and replacing it with a cross-reference to clause 10.4(d)(iii)(A).

34. Deleting clause 21.7(b)(ii) and replacing it with the following:
- (ii) The employer is also not required to provide the full 7 days' notice where the employer makes the change as a result of:
 - (A) an emergency outside of the employer's control; or
 - (B) the need to meet State or Territory regulatory requirements in circumstances where another employee's is unexpectedly absentee from work.
35. Deleting the cross-reference in clause 21.7(b)(iii) to clause 21.7(b)(ii) and replacing it with a cross-reference to clause 21.7(b)(ii)(A).
36. Deleting the cross-reference in clause 21.7(b)(iv) to clause 21.7(b)(ii) and replacing it with a cross-reference to clause 21.7(b)(ii)(A).

Chapter 16D

37. Deleting clause 21.7(a) and replacing it with the following:
- (a) An employer must ensure that the work roster is available to all employees, either exhibited on a notice board which is conveniently located at or near the workplace or through accessible electronic means.

Chapter 16E

38. Inserting the words “**(excluding out-of-school hours care)**” at the end of the heading of clause 22.1.
39. Renumbering clauses 22.1(a) to 22.1(c) as 22.1(b) to 22.1(d).
40. Inserting a new clause 22.1(a) as follows:
- (a) Clause 22.1 does not apply to employees whilst engaged in providing out-of-school hours care.
41. Renumbering clauses 22.2 to 22.3 as 22.3 to 22.4.
42. Inserting a new clause 22.2 as follows:

22.2 Meal breaks (out-of-school hours care during school vacations)

- (a) Clause 22.2 applies to employees whilst engaged in providing out-of-school hours care during school vacation periods, away from the employer's premises.
- (b) An employee will not be required to work in excess of five hours without an unpaid meal break of not less than 30 minutes and not more than one hour.

Provided that employees who are engaged for not more than six hours continuously per shift may elect to forego a meal break.

- (c) A meal break must be uninterrupted. Where there is an interruption to the meal break and this is occasioned by the employer, overtime will be paid until an uninterrupted break is taken. The minimum overtime payment will be as for 15 minutes with any time in excess of 15 minutes being paid in minimum blocks of 15 minutes.
- (d) Where an employee is required by the employer to have a meal while actively supervising children as part of the normal work routine or program, this will be treated as time worked and paid as such. In addition, clauses 22.2(b) and (c) do not apply.

Chapter 16F

43. Deleting existing clause 22.3(c) and replacing it with the following:

- (c) All rest periods must be uninterrupted, except for employees engaged in providing out of school hours care during school vacation periods, away from the employer's premises, who may be required to take a paid break while actively supervising children as part of the normal work routine or program.

Chapter 16G

- 44. Deleting Schedule A in its entirety.
- 45. Renumbering Schedule B to Schedule H as Schedule A to Schedule G.
- 46. Updating cross-references accordingly.

B. This determination comes into operation on [date].

PRESIDENT

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