Australian Industry Group

Modern Awards Review 2023 – 24
Work & Care

Submission
(AM2023/21)

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AM2023/21 MODERN AWARDS REVIEW 2023 – 24

WORK & CARE

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1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) is filed in the Modern Awards Review 2023 – 24 (**Review**), concerning the issue of *'work and care'*, in accordance with directions issued by the Fair Work Commission (**Commission**) on 29 January 2024.[1] The submission relates to the discussion paper published by the Commission on 29 January 2024 (**Paper**), which is described as forming the basis of a *'discussion with interested stakeholders on balancing work and care in the context of workplace relations settings in modern awards'*.[2]

2. The Paper focuses on 25 modern awards, which are identified at [38] of the Paper. Of those awards, Ai Group has a relevant interest in the following:

   (a) The *Aged Care Award 2010*;

   (b) The *Building and Construction General On-Site Award 2020*;

   (c) The *Children's Services Award 2010* (**CS Award**);

   (d) The *Cleaning Services Award 2020*;

   (e) The *Clerks – Private Sector Award 2020* (**Clerks Award**);

   (f) The *Electrical, Electronic and Communications Contracting Award 2020*;

   (g) The *Fast Food Industry Award 2020* (**FF Award**);

   (h) The *General Retail Industry Award 2020* (**GRIA**);

   (i) The *Hair and Beauty Industry Award 2020*;

   (j) The *Health Professionals and Support Services Award 2020*;

[1] *Modern Awards Review 2023-24* [2024] FWC 213.

[2] The Paper at [4].

(k) The *Manufacturing and Associated Industries and Occupations Award 2020* (**Manufacturing Award**);

(l) The *Miscellaneous Award 2020*;

(m) The *Nurses Award 2020*;

(n) The *Plumbing and Fire Sprinklers Award 2020* (**Plumbing Award**);

(o) The *Road Transport and Distribution Award 2020*;

(p) The *Social, Community, Home Care and Disability Services Industry Award 2010* (**SCHCDS Award**);

(q) The *Storage Services and Wholesale Award 2020*; and

(r) The *Vehicle Repair, Services and Retail Award 2020*.

3. We note that the questions posed in the Paper are not confined, in their terms, to the aforementioned awards. Thus, our responses to them relate to modern awards generally.

4. For the reasons set out in this submission:

(a) Any consideration given by the Commission to variations proposed in this stream of the Review must be consistent with the legislative framework set out at chapter 2 of this submission and in particular, the modern awards objective (**MAO**) prescribed by s.134(1) of the *Fair Work Act 2009* (**Act**). Moreover, specific consideration should be given to the impact that those proposals would have on employers (in addition to employees).

(b) The reports published and recommendations made by the Senate Select Committee on Work and Care (**Work and Care Senate Committee**) should be given limited, if any, weight.

(c) Any consideration given by the Commission to variations proposed in this stream of the Review should take into account the considerable existing flexibilities available to employees with caring responsibilities. These are summarised at chapter 5 of this submission.

(d) It is also relevant that employers typically endeavour to accommodate the needs of employees with caring responsibilities with additional flexibilities that are not required by the safety net. These arrangements are generally tailored to the specific circumstances of the employee and employer and better reflect their genuine needs than the kinds of one-size-fits-all entitlements stipulated by the safety net. The Commission should be cautious about adopting an overly-prescriptive approach in awards, which may discourage, or no longer enable, employers to facilitate other more flexible and generous approaches.

(e) The Commission should adopt the proposals we have proposed in response to various questions posed in the Paper. They would:

(i) Operate in a manner that is *'fair'* to employees and employers;[3]

(ii) Ensure that awards provide a safety net that is *'relevant'* to modern workplaces;[4]

(iii) Support the need to achieve gender equality in the workplace, by providing workplace conditions that facilitate women's full economic participation;[5]

(iv) Support the need to promote social inclusion through increased workforce participation;[6]

[3] Section 134(1) of the Act.

[4] Section 134(1) of the Act.

[5] Section 134(1)(ab) of the Act.

[6] Section 134(1)(c) of the Act.

(v) Support the need to promote flexible modern work practices and the efficient and productive performance of work;[7]

(vi) Appropriately balance the impact of the proposed changes on business;[8] and / or

(vii) Ensure that awards are simple and easy to understand.[9]

5. We note that the Paper canvasses various issues beyond the scope of the questions posed at its conclusion. In the short period of time made available to prepare these submissions, it has not been practicable to deal with or respond to all aspects of the Paper. The same can be said of various pieces of extrinsic material referenced in the Paper.

6. If the Commission proposes to rely on specific aspects of the Paper or material referred to therein, it should put parties on notice of this and provide a further opportunity to be heard. Having regard to the limited opportunity afforded to respond to the Paper, the Commission should not conclude or infer that an absence of submissions made in respect of any aspect of it demonstrates that it is not contested or opposed.[10]

[7] Section 134(1)(d) of the Act.

[8] Section 134(1)(f) of the Act.

[9] Section 134(1)(g) of the Act.

[10] Ai Group notes in this regard that it sought significant adjustments to the proposed timetable for this aspect of this Review, which would have afforded parties more time to respond to the Paper. See in particular our correspondence dated 12 February 2024. That proposal was not adopted by the Commission.

2. THE LEGISLATIVE FRAMEWORK

7. At the very outset, before considering the Paper, we deal with the legislative framework applying to the Review.

8. Section 134(1) imposes a statutory directive upon the Commission, to *'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions'*, taking into account the matters listed at ss.134(1)(a) – 134(1)(h), as follows:

(a) relative living standards and the needs of the low paid; and

(aa) the need to improve access to secure work across the economy; and

(ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

9. This is the MAO.

10. In addition, s.138 of the Act imposes a limitation on what can be included in modern awards, by reference to the MAO: (emphasis added)

> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

11. For the purposes of s.138 of the Act, a distinction must be drawn between *'that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.'*[11]

12. Further, the Commission's power to vary awards pursuant to s.157 of the Act is constrained by the MAO. It can do so only if it is *'satisfied that making the [variation] is necessary to achieve the modern awards objective'*[12].

13. Thus, the MAO is central to any consideration given to varying (or potentially varying) an award. As has been accepted on multiple occasions by the Commission in relation to that objective:

    (a) *'Fairness'* is to be assessed from the perspective of the employees and employers covered by the modern award in question.[13]

    (b) *'Relevant'*, as used in s.134(1), is intended to convey that a modern award should be suited to contemporary circumstances.[14]

    (c) The need for a *'stable'* modern awards system suggests that a party seeking to vary a modern award must advance a merit argument in support of the proposed variation. The extent of such argument will depend on the circumstances.[15]

[11] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [135] – [136].

[12] Section 157(1) of the Act.

[13] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [37]. See also the Paper at [21].

[14] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [37].

[15] *4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

(d) No particular primacy is to be attached to any of the factors listed in s.134(1) of the Act, which amount to competing considerations that need to be balanced. Rather, each of the matters articulated therein must, insofar as they are relevant to a particular matter, be treated as matters of significance in the decision making process.[16]

(e) The characteristics of the employees and employers covered by modern awards varies between awards. To some extent, the determination of a fair and relevant minimum safety net will be influenced by these contextual considerations. It follows that the application of the MAO may result in different outcomes between different modern awards.[17]

14. Variations proposed through this Review should be considered in light of the legislative context described above.

[16] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [115] and [163]. See also the Paper at [22].

[17] *4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

3. THE SENATE SELECT COMMITTEE ON WORK AND CARE

15. Section 2 of the Paper provides an overview of the Work and Care Senate Committee's activities and identifies certain recommendations made by the Committee as being potentially relevant to this Review. The recommendations are drawn from two reports released by the Work and Care Senate Committee: an interim report handed down in October 2022 (**Interim Report**) and a final report handed down in March 2023 (**Final Report**). This chapter of our submission comments on the nature of those recommendations and Ai Group's assessment of their potential relevance to the Review.

16. As a preliminary matter it must be observed that both the Interim Report and Final Report were a product of a very different process to proceedings conducted by the Commission in relation to any potential variation to modern awards.[18] The Committee was neither required to consider matters that must be taken into account by the Commission or conduct itself in the same manner that the Commission must in its conduct of the current proceedings. The consequence of this is that the reports are of limited utility to the Commission's consideration of potential variations to awards.

17. The Commission certainly could not adopt or give any meaningful weight to any determination or finding in the reports that is, or might be, based upon any factual proposition put to the Committee, absent consensus as to the veracity of the relevant factual propositions underpinning it. Such assertions have not been properly tested through cross-examination by interested parties. Indeed, reliance upon any such findings or determinations (or factual propositions put to the Committee) would be unfair.

18. The Work and Care Senate Committee was comprised of representatives from the major political parties and was established to inquire and report on terms of reference expanding far beyond workplace relations matters. For example, of the

[18] For example, s.577(1) of the Act.

10 terms of reference,[19] only three related *directly* to the workplace relations framework – being:

> c. the adequacy of workplace laws in relation to work and care and proposals for reform;
>
> d. the adequacy of current work and care supports, systems, legislation and other relevant policies across Australian workplace and society;
>
> e. consideration of the impact on work and care of different hours and conditions of work, job security, work flexibility and related workplace arrangements;

19. The focus of the Work and Care Senate Committee was on aspects of the current work and care framework that are purportedly inadequate and/or have a negative or detrimental impact on employee carers, viewed primarily from their perspective. As such, there is a clear imbalance in the extent to which the reports considered matters such as employers' experiences in relation to employee carers, the impact on business of employees accessing entitlements relevant to balancing work and care, or the perspectives of employers regarding how the existing workplace relations framework might be modified to better assist employers to support employee carers.

20. These matters necessarily limit the relevance of the Work and Care Senate Committee's reports and recommendations to this Review. They by no means reflect the outcome of a fair or balanced assessment, that took into account the circumstances of both employers and employees. Rather, they are inherently partial to the purported needs of employees, absent a proper consideration of any countervailing considerations concerning employers. To that end, they should be afforded limited (if any) weight by the Commission.

21. At the very least, the reports highlight the need to ensure that the proposed adoption by the Commission of any of the recommendations is thoroughly examined in a fair and balanced way by the Commission, having regard to the modern awards objective and the various considerations identified in s.134(1) of the Act, including, in particular, ss.134(1)(b), 134(1)(d), 134(1)(f) and 134(1)(g).

[19] Final Report at [1.1].

22. The Interim Report made eight recommendations; of which the Paper notes only two are of *'potential'* relevance to the Review. Of the 33 recommendations made in the Final Report, the Paper identifies 10 as of *'potential*' relevance to the Review.[20] We consider each of these recommendations in more detail, below.

Recommendations from the Interim Report

23. The first of the two *'potentially relevant'* recommendations from the Interim Report is Recommendation 4, which concerns a *'right to disconnect*'.[21]

24. The Work and Care Senate Committee considered the evidence it received during the inquiry concerning a right to disconnect, in the context of Australia's workplace relations and legal system and specifically, the framework allowing employees to request flexible working arrangements.[22] Relevantly, the evidence comprised:

    (a) An explanation prepared by the Police Association of Victoria of the right to disconnect contained in the enterprise agreement applying to Victorian Police;[23]

    (b) The Australian Unions '*Working from Home Charter'*;[24]

    (c) A submission by the Victorian Branch of the ANMF;[25] and

    (d) The identification of varying degrees of rights to disconnect in a handful of European countries.[26]

25. As context to its making of Recommendation 4, the Work and Care Senate Committee notes it '*considered the impact of right to disconnect provisions on the health and wellbeing of workers, and on people already time-poor due to*

[20] Paper at [15] and [17], see also Table 1.

[21] Interim Report at page xii and [6.37] – [6.45].

[22] See Chapter 5 of the Interim Report, and the discussion of the 'right to disconnect' at pages 90 – 91 within the context of the framework for flexible workplace arrangements.

[23] Interim Report at [5.101] and fn 94.

[24] Interim Report at [5.102] and fn 95.

[25] Interim Report at [5.103] and fn 96.

[26] Interim Report at [5.104] – [5.105] and fn 97.

balancing work and care commitments'[27] (emphasis added). It considered the feelings of employees in relation to the concept of '*availability creep*', and consequent health, productivity and pay impacts upon them.[28]

26. The extent of any consideration given to ***employers'*** perspectives appears to have been limited to a commitment to consider how provisions implementing a right to disconnect in some enterprise agreements are operating in practice with a view to assessing their applicability at a national level.[29]

27. Evidently, Recommendation 4 in the Interim Report was not made based on any balanced consideration of employers' perspectives relevant to the issue and therefore, it should be given limited weight.

28. For completeness, we note that the '*right to disconnect*' formed the basis of Recommendation 23 in the Final Report too (which has also been identified as potentially relevant to this Review).[30] We address this below.

29. The second recommendation from the Interim Report identified as potentially relevant to the Review is Recommendation 5, which concerns *'roster justice'*.[31]

30. The language of Recommendation 5 – *'roster justice'* – adopts politicised and emotive union rhetoric. Although the Work and Care Senate Committee received some evidence from or on behalf of employers to the effect that their industries understood the need for flexibility in rostering (in favour of employee needs)[32], the basis for Recommendation 5 focuses only on the needs of employee carers

[27] Interim Report at [6.37].

[28] Interim Report at [6.38] – [6.39].

[29] Interim Report at [6.42].

[30] The Work and Care Senate Committee addresses the interaction between recommendations in the Interim Report and Final Report, at [1.17] – [1.18] of the Final Report, stating that while both reports can be read separately the '*final report builds upon, and expands, the recommendations of the Interim Report, offering a more complete response to the current work and care crisis that this final report more fulsomely documents*'.

[31] Interim Report at xii and [6.46] – [6.55].

[32] Interim Report at [5.128] – [5.130].

and in particular the position advanced by the SDA, described as *'compelling'* in relation to *'roster justice'*.[33]

31. It is important to also have regard to the balance of perspectives reflected in the *'Additional Comments from Coalition Senators'* in the Interim Report. Notably, both of the *'potentially relevant'* Interim Report recommendations were subject to additional comment.

32. Relevantly, in relation to Recommendation 4 it was noted that:

    (a) *'the report does not take into consideration the flexibility aspect that is requested in Recommendation 3, and how it would work in relation to any legislated 'right to disconnect*';[34]

    (b) *'the recommendations would likely add further complexity and a prescriptive nature that may in fact adversely affect those it is intended to help'*;[35]

    (c) *'the employer/employee relationship is better when it is approached from a position of flexibility and common sense, and both the needs of the employer and employee are taken into consideration — not by a one-size-fits-all approach'*;[36] and

    (d) '*the report does not have data from the independent workplace relations umpire in regard to this recommendation, and that any consideration of a legislated 'right to disconnect' needs appropriate evaluation from the Fair Work Commission before any change to the Fair Work Act*'.[37]

[33] Interim Report at [6.46] - [6.53].

[34] Interim Report, Additional Comments at [1.12].

[35] Interim Report, Additional Comments at [1.13].

[36] Interim Report, Additional Comments at [1.14].

[37] Interim Report, Additional Comments at [1.15].

33. In relation to Recommendation 5 it was noted (amongst other things) that:

(a) *'Recommendation 5 does not take into consideration the flexibility aspect that is requested in Recommendation 3, and how it would work in relation to any 'rostering rights'*;[38]

(b) *'casual employment is underpinned by the concept of being on a needs-based requirement, and casuals are compensated for unpredictability through casual loading'*;[39]

(c) *'most flexible working arrangements, including changing start/finish times, days worked and change in averaging hours could potentially be adversely impacted by any prescriptive legislation or regulation around rostering'*;[40]

(d) *'employers need to make operational decisions and that prescribing rostering requirements in a one-size-fits-all approach across businesses and industry does not take into consideration individual business requirements';*[41] and

(e) '*the second part of Recommendation 5 is already in place in terms of consultation and consideration of changes to rosters and hours of work*' in the context of section 145A of the Act.[42]

34. Importantly, Recommendation 3 from the Interim Report is a recommendation that the Australian Government amend the Act, including section 65 of the Act, to:

- make the right to request flexible work available to all workers and to remove the stigma attached to its use when confined to carers;
- replace the 'reasonable business grounds' provision at section 65(5) under which employers can refuse a flexible working arrangement, with refusal only on the grounds of 'unjustifiable hardship';

[38] Interim Report, Additional Comments at [1.16].

[39] Interim Report, Additional Comments at [1.17].

[40] Interim Report, Additional Comments at [1.21].

[41] Interim Report, Additional Comments at [1.22].

[42] Interim Report, Additional Comments at [1.23].

- introduce a positive duty on employers to reasonably accommodate flexible working arrangements;
- require consultation with workers about flexibility requests; and
- revise sections 738 and 739 of the Act to introduce a process of appeal to the Fair Work Commission, for decisions made by employers under section 65 refusing to allow flexible work arrangements on the grounds of unjustifiable hardship, or on 'reasonable business grounds'.[43]

35. The Interim Report was published in October 2022. Since that time, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) was enacted, which resulted in changes to the framework for making flexible work requests under the Act. As the Final Report notes, the changes include expanded enforceable rights for carers and parents to request flexible work arrangements, new requirements for employers to try to reach agreement on flexible hours and new dispute resolution processes and penalties.[44]

36. It is imperative that any consideration given to Recommendations 4 and 5 of the Interim Report in this Review (as well as any broader consideration of notions of a '*right to disconnect*' and employee rights in relation to rosters) takes into account the matters outlined in the *'Additional Comments'* from the report as extracted above, subsequent relevant legislative changes and, more broadly, the potentially profound impact they would have on employers.

Recommendations from the Final Report

37. Of the 10 '*potentially relevant*' recommendations in the Final Report, five expressly call for legislative change and / or relate to entitlements or issues that are matters for the legislature. This includes:

    (a) Recommendation 17, which recommends that the definition of '*immediate family*' in the Act be amended and broadened for the purposes of an employee accessing carer's leave;[45]

[43] Interim Report at pages xi – xii.

[44] Final Report at [6.91]; See also Division 4 of Part 2-2 of the Act.

[45] Final Report at page xvii.

(b) Recommendation 18, which recommends the Australian Government consider the adequacy of and potential improvements in leave arrangements under the Act (including separate carer's leave and annual leave);[46]

(c) Recommendation 23, which recommends the Australian Government consider amending the Act to include an enforceable *'right to disconnect*' under the National Employment Standards (**NES**), and an increase in penalties for employers who commit *'wage theft*' via unpaid additional hours of work;[47]

(d) Recommendation 24, which recommends the mandatory annual reporting of companies with over 20,000 employees in Australia to the Commission, and other data collection requirements, relevant to rostering practices and flexible working arrangements;[48] and

(e) The aspects of Recommendation 25 which call on the Australian Government to develop statutory definitions of full-time, part-time and casual employment.[49]

38. We would oppose the implementation of any of these recommendations, through modern awards or legislation. They would likely impose additional employment costs, reduce flexibility, compound pre-existing complexities and / or increase the regulatory burden. More particularly, the implementation of these recommendations through the Review would give rise to the following specific concerns.

39. Any attempt to address as part of this Review matters which concern definitions in the Act that underpin minimum entitlements is prone to cause difficulty and confusion in the application of those entitlements. For example, should some (or all) modern awards contain an altered definition of '*immediate family*' for the

[46] Final Report at page xvii.

[47] Final Report at pages xviii – xix.

[48] Final Report at page xix.

[49] Final Report at page xix.

purpose of carer's leave, an employer who employs both award-covered and award-free employees would be required to administer the NES against two separate definitions. Recommendation 17 in the Final Report is predicated on a view of the Work and Care Senate Committee that *'broader, nationally consistent definitions for leave entitlements would be of great benefit…'* (emphasis added). Evidently, national consistency is not attainable by addressing the issue through this Review.

40. Equally, an employer may be required to maintain separate personal and carer's leave accruals for award-covered employees whilst those for non-award covered employees are combined.

41. The implementation of the aforementioned recommendations via this Review would lead to outcomes that are not consistent with the modern awards objective; in so far as it would lead to increased complexity in the administration of minimum entitlements for award-covered employees and increase the regulatory burden on employers. In addition to increases in direct costs associated with the expansion of entitlements, employers would likely also face indirect costs associated with adaptation of payroll and other business systems and procedures to accommodate the change.[50]

42. Further, we note that the Final Report was issued in March 2023 and matters concerning the '*right to disconnect*' and definition of casual employment have subsequently been addressed in the *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024* (Cth) (**Closing Loopholes No. 2 Act**).

43. In relation to the '*right to disconnect'*, Ai Group submits that the appropriate focus in this Review is new section 149F of the Act namely, the requirement for all modern awards to contain a '*right to disconnect term*' (defined as a term in a modern award that providers for the exercise of an employee's rights as set out in new sections 333M(1) and (2) of the Act). This requirement supersedes any potential relevance of Recommendation 23 of the Final Report to the Review

[50] Sections 134(1)(f) and (g) of the Act.

(and without detracting from our earlier comment at [41] above). We also refer to our response to question 5, as contained in the Paper, in this regard.

44. With respect to the balance of the Final Report recommendations identified as potentially relevant to this Review, we submit as follows.

45. *First,* Recommendation 19 concerns the Commission reviewing access to, and compensation for, paid sick and annual leave for casual and part-time workers.

46. Ai Group opposes the extension of paid sick and annual leave entitlements to casual employees. Ai Group has previously prepared a detailed submission on this issue, filed on 5 February 2024 in the Job Security stream of the Review.[51] Ai Group relies on that submission in the context of any consideration of Recommendation 19 of the Final Report in this Review.

47. Further, since the Work and Care Senate Committee made Recommendation 19, substantial amendments to the casual employment provisions of the Act have been implemented by the Closing Loopholes No. 2 Act. The changes include, amongst other things, a new definition of *'casual employee'* (which will in essence narrow the scope for an employer to elect to engage a new employee as a casual employee) and a new *'employee choice'* casual conversion mechanism (including wide-ranging powers of the Commission to deal with disputes relating to the new provisions).

48. Taken together, these measures are intended by the Government to have the practical effect of substantially increasing the ability of casual employees to access permanent full-time and part-time employment to which paid sick and annual leave entitlements attach. Ai Group submits that this diminishes arguments in support of awards being used to address paid leave entitlements for casual employees.[52]

[51] See pages 51 – 60 of the submission of Australian Industry Group filed on 5 February 2024 in *Modern Awards Review 2023-24 – Job Security* (FWC Matter AM2023/21) (**Ai Group Job Security Submission**).

[52] See also Ai Group Job Security Submission at [163].

49. *Second,* Recommendation 21 concerns roster changes. Ai Group addresses its position on notice of rosters, in response to question 8 of the Paper later in this submission.

50. In relation to the portion of Recommendation 21 that concerns the proposition that the Commission review awards '*to ensure employees have a 'right to say no' to extra hours with protection from negative consequences*'[53]; Ai Group submits that this matter is already addressed in the NES insofar as employees have an existing right to refuse hours in addition to 38 per week in various circumstances (or the lesser of 38 ordinary hours and an employee's ordinary weekly hours, where the employee is not engaged on a full-time basis).[54] An employee who refuses to work additional hours may be seen as exercising a '*workplace right*'[55] in respect of which the employee is protected from adverse action against them pursuant to the general protections provisions contained in Part 3-1 of the Act.[56] It follows that it is not '*necessary*' for modern awards to be varied to give effect to this aspect of Recommendation 21, since the matter is already effectively dealt with under the Act.

51. *Third,* Recommendation 22 suggests the Commission review the operation of the 38-hour working week set in the NES, and the extent and consequences of longer hours of work; and further, that the review should '*also consider stronger penalties for long hours and other possible ways to reduce them, including through the work, health and safety system…*'.[57] It is not apparent how any review of the operation of the NES may be conducted by the Commission. Further, the Commission does not have power to set penalties in relation to matters of work, health and safety. For this reason, Ai Group disagrees with the identification of Recommendation 22 as *'potentially relevant'* to the Review. Our position is that it is not relevant.

[53] Final Report at [8.126].

[54] Section 62 of the Act.

[55] As defined in section 341 of the Act.

[56] See in particular section 340 of the Act.

[57] Final Report at [8.130].

52. *Lastly*, if (despite our submissions) the Commission considers that the Interim Report and / or Final Report (or parts thereof) should be given weight in the Review, we note the additional comments from Coalition Senators contained in the Final Report - including at a high level, their observation regarding the '*aspirational*' nature of the recommendations.[58] In particular, Ai Group highlights the following comments to which the Commission should also have regard:

    (a) That '*the best way to encourage Australians into work is to support all forms of work, as this gives Australian jobseekers the ability to find positions, arrangements and levels of work that fit around their needs*';[59]

    (b) The Coalition Senators' observation that *'(m)any recommendations of this report will see further deterioration of the flexibility and consideration of what employers and employees are looking for when it comes to fulfilling work, and a move to a further regimented and legalistic nature of the workplace relations system. Such change will be detrimental to all Australians*';[60] and

    (c) The observation that '*the employer/employee relationship is better when approached from a position of flexibility and common sense, and both the needs of the employer and employee are taken into consideration – not by a 'one-size-fits-all' approach*'.[61]

[58] Final Report, [1.1] at page 201.

[59] Final Report, [1.3] at page 201.

[60] Final Report, [1.4] at page 201.

[61] Final Report, [1.5] at page 201.

4. EXISTING FLEXIBILITIES AND MECHANISMS

53. In assessing whether awards should be varied to provide additional flexibilities in respect of employees with caring responsibilities, consideration must necessarily be given to the extent to which the minimum safety net already provides such flexibilities; many of which are contained in the NES. This is, in part, because s.134(1) of the Act states that the Commission must ensure that modern awards, '*together with the NES'*, provide a fair and relevant minimum safety net.

54. In this section, we outline the numerous existing flexibilities provided to employees which directly or indirectly assist, enable and/or enhance their ability to provide care to their family. Their existence tempers the extent to which it is *necessary* to vary modern awards in this regard.

55. It is also relevant that employers commonly provide more beneficial arrangements than what is required by the safety net, having regard to their specific circumstances and capacity to do so. In some cases, such arrangements are enshrined in enterprise agreements, workplace policies, employment contracts and the like. In other cases, the arrangements are made on an ad hoc or informal basis. Later in this part of our submission, we provide some key statistics from the Workplace Gender Equality Agency (**WGEA**), which demonstrate the types of additional flexibilities that are, in practice, being afforded by employers.

56. It is apparent from the aforementioned material and from our experience that employers typically adopt a reasonable and compassionate approach towards employees who have family and caring responsibilities. Often, the arrangements implemented reflect the genuine needs of the employee and are tailored to their particular circumstances. The introduction of one-size-fits-all arrangements in awards will not necessarily be as effective in meeting employees' needs.

57. The imposition of additional costs, inflexibilities and other burdens associated with new unwarranted entitlements may cause employers to abandon their efforts to implement alternate means of genuinely seeking to address their

employees' desire for flexibility. This may have the unfortunate consequence of undermining much of the progress made to date in this respect and hamper further progress.

58. The responsibilities and needs of employees with caring responsibilities differ greatly from employee to employee. It follows that, to some extent, the best approach to providing employees with greater flexibility and support is through cooperative discussion and collaboration at the workplace level between an individual employer and employee. This is most likely to result in outcomes that reflect the nuances of individual employees' circumstances, whilst also balancing the operational impacts of the arrangements on employers.

The NES

59. The NES provides a number of flexibilities which enable employees to undertake caring responsibilities, in conjunction with the performance of work. We have set out below several of these examples.

Maximum Weekly Hours[62]

60. An employer must not request or require an employee to work more than the specified number of hours in a week, unless those additional hours are reasonable. Further, employees can refuse to work additional hours if they are unreasonable. An employee's personal circumstances, including family responsibilities, is expressly identified in the Act as a matter that is relevant to the question of whether the additional hours are reasonable.

61. Many awards also contain provisions concerning *'reasonable additional hours'* that generally reflect the NES.[63]

[62] Section 62 of the Act.

[63] See for example the awards identified at [193] of the Paper.

Flexible Working Arrangements[64]

62. A permanent and regular casual employee with 12 months of service[65] with an employer, who:

    (a) is pregnant;

    (b) is a carer (as defined under the *Carer Recognition Act 2010* (Cth));

    (c) has a disability;

    (d) is a parent (or has responsibility for the care of a child), including when returning to work after taking leave in relation to the birth or adoption of the child; or

    (e) is providing care to an immediate family or household member experiencing family and domestic violence,

    is eligible to make a request for flexible working arrangements.[66]

63. Examples of changes in working arrangements that can be the subject of a flexible working arrangement include changes in hours of work, patterns of work, and location of work.[67]

64. Employers must follow a detailed process if they receive a request pursuant to s.65 of the Act and can only refuse a request on limited grounds.[68] Further, the Commission can deal with disputes about such requests, including by arbitration.[69]

[64] Section 65 of the Act.

[65] In the case of regular casual employees, in addition to the 12 months service requirement, they also need to have a reasonable expectation of continuing employment by the employer on a regular and systematic basis (s.65(2)(b)(ii) of the Act).

[66] Section 65(1A) of the Act.

[67] Section 65(1) of the Act and following note.

[68] Section 65A of the Act.

[69] Section 65B of the Act.

Annual Leave[70]

65. Full-time employees accrue four weeks of annual leave during a period of 12 months and part-time employees accrue a proportionate amount, based on their ordinary hours of work. The Act does not restrict the purposes for which that leave may be taken. Further, employers must not unreasonably refuse a request to take leave.

Paid Carer's Leave[71]

66. Permanent employees are able to take up to 10 days of paid carer's leave each year, to provide care or support to an immediate family or household member who is ill, injured or experiencing an unexpected emergency. Untaken leave accumulates from year to year.

Unpaid Carer's Leave[72]

67. Permanent and casual employees are able to take up to two days of unpaid carer's leave to provide care or support in the same circumstances described above.

Compassionate Leave[73]

68. Employees are able to take up to two days of compassionate leave in various situations, including:

    (a) After an immediately family or household member who has contracted or developed an illness or injury that poses a serious threat to their life;

    (b) After the death of an immediately family or household member, or the stillbirth of a child that would have been a member of the employee's immediate family or household; or

[70] Sections 87 – 89 of the Act.

[71] Sections 96 and 97 of the Act.

[72] Section 102 of the Act.

[73] Sections 104 - 106 of the Act.

(c) After the employee, the employee's current spouse or de facto partner, has a miscarriage.

69. Permanent employees are entitled to be paid for the leave.

Family and Domestic Violence Leave (**FDV Leave**)[74]

70. Permanent and casual employees are able to take up to 10 days of paid FDV Leave each year, where the employee needs to do something to deal with the impact of family and domestic violence; for example, arranging for the safety of a close relative (i.e. an immediate family member or a relative according to Aboriginal or Torres Strait Islander kinship rules).

Parental Leave and other Related Entitlements

71. The NES entitles permanent and regular casual employees with 12 months of service[75] with their employer to the following forms of leave and entitlements in order to enable such employees to provide care to an expected child during a period of pregnancy and following the birth and/or adoption of the expected child:

(a) Unpaid parental leave[76] of up to 12 months (or up to 24 months with agreement) of unpaid parental leave, where the employee has or will have responsibility for the care of a child that the employee, spouse or de facto partner has given birth to, or where a child (under 16) has been adopted and placed with the employee. An employee's entitlement to unpaid parental leave is not affected by how much leave their partner takes.

Such entitlement is also available in situations where the child is stillborn or dies within 24 months of birth.[77]

[74] Sections 106A and 106B of the Act.

[75] In the case of regular casual employees, in addition to the 12 months service requirement, they also need to have a reasonable expectation of continuing employment by the employer on a regular and systematic basis had it not been for the birth (or expected birth) or adoption (or expected adoption) of a child. (s.67(2)(b)(ii) of the Act).

[76] Section 70 of the Act.

[77] Section 77A of the Act.

In the event a child has to remain in hospital after birth or is hospitalised immediately after birth (including where the child was premature, had developed a complication, or contracted an illness during or following birth), an employee can agree with their employer to place their unpaid parental leave on hold. In effect, this allows the employee to return to paid work, without any reduction to their unpaid parental leave.[78]

(b) Flexible unpaid parental leave of up to 100 days[79] (which was increased on 1 July 2023 from 30 days as a result of the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* (**PWE Act**)) within 24 months following the child's birth or adoption or 6 weeks before the expected birth, including before or after a period of continuous unpaid parental leave. This enables the employee to take unpaid parental leave flexibly; i.e. in a single continuous period of one day or longer, or separate periods of one day or longer each, instead of being required to take unpaid parental leave in a single continuous period. The PWE Act also enabled both parents to take flexible unpaid parental leave of up to 12 months (or up to 24 months with agreement), regardless of the amount of leave taken by the other parent or whether such leave is taken at the same time as the other parent.

(c) Unpaid special parental leave[80] if the employee is not fit for work during such period because:

(i) Of a pregnancy-related illness; or

(ii) Where the pregnancy ends after 12 weeks because of miscarriage or termination and the child is not stillborn.

[78] Section 78A of the Act.

[79] Section 72A of the Act.

[80] Section 80 of the Act.

Any unpaid special parental leave taken by the employee while they are pregnant will not reduce the amount of unpaid parental leave available to the employee.

(d) If an employee is fit for work, but it is inadvisable for them to continue in their usual position because of an illness or risk arising out of the pregnancy, or hazards connected with that position, such employee must be transferred to an appropriate safe job that has the same ordinary hours of work as the employee's usual position (unless otherwise agreed to by the employee).[81]

If an appropriate safe job is available, the employee must be transferred to that job for the risk period (until it is safe to go back to their usual job or until they give birth), with no other change to the employee's terms and conditions of employment. The employer must continue to pay the employee at their full rate of pay for their usual position and for the hours that they work during the risk period.[82]

If there is no appropriate safe job available and the employee is entitled to unpaid parental leave, the employee will be entitled to take paid '*no safe job leave*' for the risk period, in which the employee will receive their base pay rate for ordinary hours of work during the risk period.[83]

If there is no appropriate safe job available and the employee is not entitled to unpaid parental leave, the employee will be entitled to take unpaid no safe job leave for the risk period.[84]

72. It should also be noted that the above entitlements in respect of parental leave are in addition to the government funded paid parental leave scheme and employer funded paid parental leave policies. On 1 July 2023, the Government funded paid parental leave scheme was enhanced as a result of the *Paid*

[81] Section 81(1) of the Act.

[82] Sections 81(2) - (4) of the Act.

[83] Section 81A of the Act.

[84] Section 82A of the Act.

Parental Leave Amendment (Improvements for Families and Gender Equality) Act 2023 (Cth), with the 18 weeks of '*Parental Leave Pay*' (which was generally available to the primary carer of the child only) and two weeks of '*Dad and Partner Pay*' (which was available to the partner of the primary carer), being combined into a single 20 week entitlement that can now be accessed by both carers and taken flexibly; i.e. as a single block or broken up into multiple periods. Further amendments to the Government's paid parental leave entitlement are currently being considered by the Senate, with the *Paid Parental Leave Amendment (More Support for Working Families) Bill 2023* (Cth) proposing to increase such entitlement by two weeks each year until it reaches a total of 26 weeks on 1 July 2026.

Modern Awards

73. Modern awards provide award-covered employees with a range of flexibilities which enable employees to undertake caring responsibilities. We have set out below a number of these examples.

Individual Flexibility Arrangements (**IFAs**)

74. The Act requires all modern awards to include a term enabling an employer and employee to agree on an IFA. All modern awards currently contain a model IFA clause. Section 4.2.2 of the Paper sets out the requirements for making an IFA, the matters that an IFA can deal with, and the operation and effect of an IFA under the model IFA award term. As such, we need not repeat this here.

75. Rather, we simply observe that IFAs are a key mechanism by which employees are able to make alternative flexible working arrangements that genuinely accommodate their needs, including with respect to any personal caring responsibilities.

76. Research in relation to IFAs has been conducted by the General Manager of the Commission pursuant to s.653(1) of the Act on four occasions.[85] Notably, in the section of the 2012-15 Report dealing with *'Outcomes reported by employees with IFAs',* the most common outcome overall (at 42 percent of employees) was flexibility to better manage non-work-related commitments. Further, most IFAs were reportedly initiated by employees.

77. Variations to award terms dealing with arrangements for when work is performed has consistently been reported as the most common variation type for which an IFA is used:

    (a) The 2009-12 Report found that arrangements for when work is performed was the most frequently reported form of variation.[86]

    (b) The 2012-15 Report found that three-quarters of employers, regardless of whether they had made IFAs with a single or multiple employees, indicated that the most common variations in IFAs were to *'arrangements for when work is performed'* (including changes to the span of ordinary hours or to the days of the week when work is performed, or modifications to breaks or entitlements to rest periods).[87]

    (c) The 2015-18 Report found that the most common elements included (or sought to be included) in IFAs were a reduction in hours (from full-time to part-time), changes to the start and finish times, changes to the days of work, changes to the time work is performed, and working from home during selected days of the week.[88]

[85] Referred to in this submission as the 2009–12 Report, 2012–15 Report, 2015–18 Report and 2018 - 21 Report.

[86] 2009-12 Report, page 60.

[87] 2012-15 Report, pages vii and 30.

[88] 2015-18 Report, page 18.

(d) The 2018-21 Report found that employee-requested variations were more likely to involve changes to start/finish times, change in days worked and a reduction in the number of days worked.[89]

78. Critically, the model term requires an employer to ensure that an employee is better off overall under an IFA as compared to the relevant terms in the applicable modern award.

Facilitative Provisions

79. Modern award facilitative provisions enable an employer and an individual employee, an employer and the majority of employees, or both, to agree to vary the operation of certain terms in a modern award. Section 4.2.3 of the Paper sets out the nature and operation of facilitative provisions in modern awards.

80. Paragraph [131] of the Paper notes that whilst facilitative provisions in modern awards are wide ranging, common facilitative provisions relate to time off instead of payment for overtime, make-up time, taking annual leave in advance, substitution of public holidays, rostered days off, rostering, rest breaks, averaging of hours and call-backs. The ability for facilitative provisions to vary the operation of such award terms with individual and/or majority agreement is another example of an effective mechanism by which employees may be able to achieve the flexibility that they desire to facilitate their responsibilities as a carer.

Other Award Terms

81. Other terms that are commonly found in modern awards which either directly or indirectly assist, enable or enhance an employee's ability to undertake caring responsibilities include the following:

(a) Part-time and casual employment, which enable employees to work less than full-time hours;

(b) Ordinary hours to be performed non-continuously;

[89] 2018-21 Report, pages 12-13.

(c) Rostering provisions, including requirements to publish rosters, provide a minimum amount of notice of rosters and / or constrain the extent to which rosters can be altered;

(d) Make-up time;

(e) Time off instead of payment for overtime;

(f) Meal breaks;

(g) Annual leave taken in advance;

(h) Substitution of public holidays or rostered days off;

(i) Consultation about changes to regular rosters or ordinary hours of work; and

(j) Consultation about the implementation of major changes that are likely to have *'significant effects'* on employees. The model consultation term states that *'significant effects'* include *'alteration of hours of work'*.

Other Beneficial Arrangements

82. As earlier stated, employers often provide more beneficial arrangements than what the safety net requires.

83. Data from the 2022-23 WGEA Gender Equity Score Card (i.e. for the period between 1 April 2022 to 31 March 2023) in relation to organisations with 100 or more employees (a total of 5135 employers, employing just over 4.8 million employees), reveals the following:

(a) Employers have continued to '*embed flexible work policies into their business*' and this has followed a '*steep rise in flexible work during COVID-19*', with the proportion of employers with a flexible work policy or strategy reaching a peak of 84% in 2022 – 2023, with 92% of employees having

access to flexible work policies or being covered by a flexible work strategy.[90]

(b) The top five, most common types of flexible work offered by employers were:

(i) Unpaid leave (99% of employers);

(ii) Part-time work (98% of employers);

(iii) Flexible hours (97% of employers);

(iv) Working from home (95% of employers); and

(v) Time in lieu (93% of employers).[91]

(c) 63% of employers offered some form of paid parental leave in addition to the government funded paid parental leave scheme.[92]

(d) The average length of employer-funded paid parental leave was 12 weeks for both universally available (i.e. offered equally to men and women) and primary carers (i.e. those policies which define a carer's role in the family unit as the primary carer).[93]

(e) 86% of employers that offered employer-funded parental leave paid superannuation on that leave.[94]

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[90] WGEA, *WGEA Gender Equality Scorecard 2022-23*, page 59 <https://www.wgea.gov.au/sites/default/files/documents/2022-23%20WGEA%20Gender%20Equality%20Scorecard.pdf> (accessed 11 March 2024).

[91] WGEA, *WGEA Gender Equality Scorecard 2022-23*, page 63 <https://www.wgea.gov.au/sites/default/files/documents/2022-23%20WGEA%20Gender%20Equality%20Scorecard.pdf> (accessed 11 March 2024).

[92] WGEA, *WGEA Gender Equality Scorecard 2022-23*, page 65 <https://www.wgea.gov.au/sites/default/files/documents/2022-23%20WGEA%20Gender%20Equality%20Scorecard.pdf> (accessed 11 March 2024).

[93] WGEA, *WGEA Gender Equality Scorecard 2022-23*, page 70 <https://www.wgea.gov.au/sites/default/files/documents/2022-23%20WGEA%20Gender%20Equality%20Scorecard.pdf> (accessed 11 March 2024).

[94] WGEA, *WGEA Gender Equality Scorecard 2022-23*, page 71 <https://www.wgea.gov.au/sites/default/files/documents/2022-23%20WGEA%20Gender%20Equality%20Scorecard.pdf> (accessed 11 March 2024).

(f) 72% of employers had a policy and/or strategy to support employees with family or caring responsibilities. The five most common forms of support offered to carers were:

(i) Carer's leave (99% of employers);

(ii) Breastfeeding facilities (60% of employers);

(iii) Referral services to support employees with family and/or caring responsibilities (48% of employers);

(iv) Targeted communication mechanisms (e.g. intranet/forums) (47% of employers); and

(v) Coaching for employees on returning to work from paid parental leave (36% of employers).[95]

84. It is readily apparent from the above that many employers are increasingly affording their employees with caring responsibilities with leave and other forms of support, in excess of what is required by the safety net.

[95] WGEA, *WGEA Gender Equality Scorecard 2022-23*, page 73 <https://www.wgea.gov.au/sites/default/files/documents/2022-23%20WGEA%20Gender%20Equality%20Scorecard.pdf> (accessed 11 March 2024).

5. QUESTION 1 – PART-TIME EMPLOYMENT

85. Question 1 is as follows:

> Are there any specific variations to part-time provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

86. Generally, awards regulate part-time employment as follows:

(a) A part-time employee is defined as one who works a *'regular pattern'* of hours and / or one who has *'reasonably predictable hours'*.

(b) The employer and employee must agree on the arrangement of the employee's ordinary hours upon engagement; including the days they will work each week and their specific start and finish times. Some awards go so far as to also require agreement as to when the employee will take their meal breaks and for how long.[96]

(c) Employers have very limited, if any, scope to change that arrangement unilaterally. Typically, such changes can be made only by agreement.

(d) Minimum engagement / payment periods apply; requiring an employer to engage or pay an employee for a minimum number of hours per shift. The minimum period varies between awards; but is generally three or four hours in length.

(e) Work performed in excess of the agreed hours constitutes overtime and is to be paid as such.

(**Standard Part-time Model**)

87. The Standard Part-time Model is overwhelmingly rigid and inflexible; so much so that it is commonly prohibitive and results in employers instead employing casual employees or adopting other forms of engagement (such as labour hire workers or independent contractors).

[96] See for example clause 10.5(c) of the GRIA.

88. Reforming the manner in which part-time employees may be engaged and the terms and conditions that apply to them under awards (particularly in relation to their hours of work) would create new permanent employment opportunities, to the benefit of employers and employees, including those with caring responsibilities. Specifically, it would provide such employees with the security of permanent and ongoing work, along with various leave entitlements that are confined to permanent employees.

89. Bearing in mind the need to take into account the specific circumstances of employers and employees covered by each award; we propose that through this process, consideration is given to liberalising access to part-time employment in awards that presently adopt the Standard Part-time Model, in the following ways:

    (a) Greater flexibility as to the fixation of employees' ordinary hours of work;

    (b) Greater scope to vary their hours of work; and

    (c) The option to agree that the employee will work additional hours at ordinary rates.

90. Further, the Closing Loopholes No. 2 Act will implement a new definition of '*casual employee*' by replacing the existing s.15A of the Act. The Government expects that 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).

91. 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.

92. The Closing Loopholes No. 2 Act also increases the frequency with which casual employees are required to be provided with a copy of the Casual Employment Information Statement. This change to the Act 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.

93. There is still some uncertainty as to the precise practical impact that the legislative amendments will have on the accessibility of casual employment in the context of awards. On its face, however, there will foreseeably be a pressing need to reassess the suitability of current award provisions related to part-time employment that were developed in a different context. Indeed, to some degree, such a need potentially already exists, having regard to the definition at s.15A of the Act.

94. Put simply, provisions governing access to part-time employment may need to be made far less restrictive in order to ensure that awards meet the needs of both employers and employees. At the very least, there may be a need to ensure that employment arrangements that are not consistent with either any new definition of casual employment under the Act or requirements of awards relating to the definition or engagement of part-time employees are catered for.

6. QUESTION 2 – IFAS

95. Question 2 is as follows:

> Are there any specific variations to the individual flexibility agreement provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

96. Ai Group proposes that awards be varied to enable an IFA to be entered into by an employer and a prospective employee, prior to the commencement of their employment.

97. The Paper notes that '*[a] key strategy for addressing challenges faced by working carers is implementing flexibility in the workplace*'.[97]

98. The Work and Care Senate Committee gave significant consideration to the needs of employee carers with respect to flexible terms and conditions of employment that enable them to balance their work and care commitments. One of its conclusions on the issue of flexibility was that '*the lack of flexibility in the workplace has a direct, detrimental impact on people balancing work and care, regardless of industry and particularly for people in casual, part-time or shift work arrangements*'.[98]

99. Much of the focus of the Work and Care Senate Committee's consideration was in relation to the mechanism for requesting flexible work arrangements under the NES (the framework which has significantly changed since the inquiry delivered its reports). This culminated in Recommendation 3 of the Interim Report[99] and Recommendation 24 of the Final Report.[100]

100. Ai Group submits that IFAs are a further tool that is critical to accommodating flexibilities sought by employees (for reasons that include but are not necessarily limited to carer's responsibilities). This is consistent with the Explanatory Memorandum to the *Fair Work Bill 2008*, which stated that the intended purpose

[97] The Paper at [103].

[98] Interim Report at [6.28].

[99] Interim Report at page xi and [6.24] – [6.35].

[100] Final Report at page xix and [8.137] – [8.143].

of IFAs includes '*assist[ing] employees in balancing their work and family responsibilities and improve retention and participation of employees in the workforce*'.[101]

101. Indeed, it may be the case for award covered employees that due to the particular terms of an award and the arrangement being sought, the type of flexibility requested may only be able to be lawfully implemented through an IFA. By way of example, the ability of an employer and employee to vary the effect of award terms relating to arrangements for when work is performed may enable the implementation of an arrangement that is otherwise prohibited by the Award. Further, an employer may be encouraged to agree to enter into an IFA with the employee if it also renders some benefit to the employer.

102. Presently, an employer cannot make an IFA with a prospective employee (that is, pre-employment). This is, in our submission, antithetical to the needs of employee carers and represents a material limitation on the utility of the model flexibility term. In a similar vein, the Work and Care Senate Committee stated (in the context of requests for flexible work arrangements made under the NES) that:

> The fact that flexibility cannot be requested…by those re-entering the workforce after a period of absence, appears to ignore the key drivers of needing flexibility in the first place. New part-time or casual employees may be balancing care responsibilities or be returning to work after a period of caring ends. The workplace relations system should be structured to support workforce participation in such circumstances – not make it more difficult to secure work.[102]

103. As noted in the Paper, all modern awards (as well as enterprise agreements and other registered agreements) are required to include a flexibility term enabling an employer and an employee to agree on an IFA.[103] The standard model flexibility term is contained in all modern awards.[104] It contains a range of procedural requirements before an IFA can be implemented, including the

[101] Explanatory Memorandum to the *Fair Work Bill 2008* at [94], cited in the Paper at [122].

[102] Interim Report at [6.29].

[103] Paper at [121]; see also section 144(1) of the Act.

[104] Paper at [123]. See also at Fair Work Commission, *Discussion Paper – Job Security, Modern Awards Review 2023-24*, published 18 December 2023 (**Job Security Discussion Paper**) at [211]. As noted in the Job Security Discussion Paper, the *Textile, Clothing, Footwear and Associated Industries Award 2020* contains additional provisions to the standard model flexibility term.

limitation that one can only be made after an employee has commenced employment with the employer.[105] Relevantly, subclause 3 states:

> An agreement may only be made after the individual employee has commenced employment with the employer.

104. In our submission an employer and prospective employee who wish to implement an IFA should be empowered to do so.

105. The potential benefits to employees (including prospective employees) of being able to enter into an IFA prior to commencing employment include having certainty as to whether they can secure flexibilities that may be critical to whether they will be able to discharge the requirements of their employment once engaged. This may ultimately influence a prospective employee's decision as to whether or not to accept employment. It could potentially be the difference between a person seeking a more secure employment opportunity for which an IFA can be negotiated *vis-à-vis* seeking a less secure form of engagement. As the model flexibility term currently stands, an employer who is willing to accommodate a prospective employee's request to make an IFA is prevented from doing so.

106. We note there may be some doubt as to whether the Act permits the model flexibility clause to be varied so as to remove the restriction on IFAs being able to be made pre-employment. The model flexibility term as originally inserted into awards did not contain the relevant restriction regarding IFAs. It was inserted into the model flexibility clause as part of the Transitional Review of modern awards, pursuant to the Commission's decision in *Modern Awards Review 2012 – Award Flexibility* [2013] FWCFB 2170.[106]

107. To the extent the Commission is of the view that it is not empowered to make this change to the model flexibility term, there would be merit in the Act being amended to clearly enable IFAs to be made pre-employment. We respectfully propose that the potential benefits of IFA's being made pre-employment, as

[105] See Job Security Discussion Paper at page 94.

[106] See *Modern Awards Review 2012 – Award Flexibility* [2013] FWCFB 2170 at [209]; See also Job Security Discussion Paper at [209].

identified by Ai Group, be noted in the report prepared for the purpose of the Review.

7. QUESTION 3 – FACILITATIVE PROVISIONS

108. Question 3 is as follows:

> Are there any specific variations to the facilitative provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

109. Facilitative provisions are a common feature of modern awards and an important mechanism by which flexibilities can be afforded to employees who are also carers. We refer to section 4.2.3 of the Paper in this regard.

110. Certain facilitative provisions in modern awards provide for the span of hours to be varied by agreement with the employees in the workplace (or the relevant section of it). However, the ability to expand the span of hours on both ends (i.e. the start and finish times of the span), by agreement with an individual employee, is not always permitted.

111. Based on the 25 modern awards which have been identified in section 2.4 of the Paper, there are four relevant categories of awards:

    (a) Category 1 – alteration to one end of the span permitted.

    (b) Category 2 – alteration to shift the span permitted.

    (c) Category 3 – span of hours prescribed but no facilitative provision.

    (d) Category 4 – alteration to the span permitted by agreement with multiple employees only.

112. In the submissions that follow, we propose variations to each of the above categories of provisions. In essence, we suggest that the span of hours should be able to be expanded, on both ends, by agreement between an employer and employee. The variations proposed should be made to all awards that contain such provisions. They would create opportunities for employees to work at times that best suit them, where such arrangements are currently not permissible. We note that the benefit of such arrangements to employees with family

responsibilities and personal commitments has previously been recognised and accepted by the Commission.[107]

Category 1 – Alteration to One End of the Span Permitted

113. Of the 25 modern awards analysed in the Paper, two[108] permit a facilitative arrangement to be made in respect of varying one end of the prescribed span of hours only. For example, the Plumbing Award prescribes a span of hours of 7.00am to 6.00pm on Monday to Friday,[109] but only permits the start of the span of hours to be varied: (emphasis added)

> **15.3 Early start**
>
> **(a)** By agreement between the employer and its employees, the working day may begin at 6.00 am or at any other time between that hour and 8.00 am and the working time will then begin to run from the time so fixed.
>
> **(b)** The daily rest breaks, meal breaks and finishing time must be adjusted accordingly.

114. Employers and employees should also be permitted to vary the finish time of the prescribed span (irrespective of whether the start time of the span of hours has been varied). There may be various circumstances in which an employee wishes to work ordinary hours beyond 6.00pm. For example, an employee may wish to start work mid-morning, after leaving their young children in their grandparents' care. They may be able and willing to work until 7.00pm because their children's other parent works morning shifts, finishes work mid-afternoon and therefore, is able to care for their children at night.

[107] *4 yearly review of modern awards—Plain language project* [2019] FWCFB 5409 at [221].

[108] Clause 16.11(a) of the *Building and Construction General On-site Award 2020* and clause 15.3(a) of the Plumbing Award.

[109] Clause 15.2(c) of the Plumbing Award.

115. The following amendments would give effect to the variations we propose in the context of the Plumbing Award:

15.3 ~~Early start~~ Altering the span of hours

(a) By agreement between the employer and an employee (or ~~its~~ employees), the spread of ordinary hours prescribed by clause 15.2(c) may be altered by up to one hour at each end. ~~working day may begin at 6.00 am or at any other time between that hour and 8.00 am and the working time will then begin to run from the time so fixed.~~

(b) The daily rest breaks~~,~~ and meal breaks ~~and finishing time~~ must be adjusted accordingly.

116. Consequential amendments to the references to clause 15.3 elsewhere in the award would also be required (i.e. in clauses 7.2 and 15.2(c)).

Category 2 – Shift to the Span Permitted

117. Many awards contain a facilitative provision which provides for the prescribed span of hours to be shifted forward or backward by up to one hour.

118. For example, clause 17.2(d) of the Manufacturing Award currently provides the following: (emphasis added)

17.2 Ordinary hours of work—day workers

…

(d) The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 6.00 am and 6.00 pm. The spread of hours (6.00 am to 6.00 pm) may be moved up to one hour forward or one hour back by agreement between an employer and:

(i) the majority of employees at the workplace;

(ii) the majority of employees in a discrete section of the workplace; or

(iii) an individual employee.

Different agreements may be reached with the majority of employees in different sections of the workplace or with different individual employees.[110]

[110] A substantively similar clause applies to shiftworkers in clause 33.2(c) of the Manufacturing Award.

119. The predecessor clause to the above, previously provided that: (emphasis added)

36.2 Ordinary hours of work—day workers

…

(c) The ordinary hours of work are to be worked continuously, except for meal breaks, at the discretion of the employer between 6.00 am and 6.00 pm. The spread of hours (6.00 am to 6.00 pm) may be altered by up to one hour at either end of the spread, by agreement between an employer and the majority of employees concerned or, in appropriate circumstances, between the employer and an individual employee.

(**Predecessor Clause**)

120. The Predecessor Clause (and clauses substantively similar to it) were amended as a result of the plain language redrafting process (**PLR Process**) and extant clause 17.2(d) (and clauses substantively similar to it) were incorporated into 10 other modern awards.[111]

121. During the PLR Process, the Commission found that clauses substantively similar to the Predecessor Clause, which contained a reference to the word '*either*', were ambiguous because it was unclear whether the prescribed span of hours could be altered:

(a) At *both* ends, to effectively '*shift'* the spread forward or backwards (in the example of the Manufacturing Award, 7.00am to 7.00pm or 5.00am to 5.00pm);

(b) At *both* ends to *increase* the total number of ordinary hours in the spread (in the example of the Manufacturing Award, 5.00am to 7.00pm); [112] or

(c) At *one* end of the spread only (in the example of the Manufacturing Award, 5.00am to 6.00pm or 6.00am to 7.00pm).

[111] See *Four yearly review of modern awards – plain language re-drafting – facilitative provisions altering spread of hours* [2021] FWCFB 3426 at [2] for the list of awards which were amened.

[112] See *4 yearly review of modern awards—Plain language project* [2019] FWCFB 5409 at [155].

122. The Commission ultimately determined to vary the relevant awards by making it clear that the spread of hours can only be '*shifted*' by an hour forward or backwards under a facilitative arrangement in those awards (i.e. outcome (a) above). The Commission came to the view that clauses substantively similar to the Predecessor Clause were: (emphasis added)

> **[3]** … intended to operate so that an agreement made with a group of employees or, where available, with an individual employee, permitted an alteration to shift the entire spread of hours forward by one hour or back by one hour. Hence, if the standard spread is 6am to 6pm (a 12 hour spread) the Alteration clause would facilitate the variation of the spread forward to 5am to 5pm, or back to 7am to 7pm, retaining the 12 hour spread. This approach is consistent with the language used in the provisions. The alternative approaches contended for have no practical utility because, as earlier stated, they cannot result in the employee's number of ordinary working hours in the day being extended.[113]

123. We do not here seek to contest the Commission's decision as it related to the intention or history of the Predecessor Clause. We do however contend that, as a matter of merit, provisions that permit the span of hours to be *shifted* should instead be varied to enable them to be *expanded* by up to one hour on both ends.

124. Allowing an employer and employee to agree to stretch the span of hours on one or both ends is a simple and easy[114] way to improve flexibility. It would, for example, allow an employee with caring responsibilities and their employer under the Manufacturing Award to agree that the span of hours, as it applies to them, will be 5.00am to 7.00pm. This may result in the employee commencing work early in the morning on some days and finishing later in the evening on other days, having regard to the employer's operational needs and the employee's personal circumstances. The Manufacturing Award (as is the case with many awards) prescribes a maximum number of ordinary hours that may be worked on a given day.[115] Thus, even if agreement is reached to expand the span of hours, an employee would not be able to be required to work more than that

[113] *Four yearly review of modern awards – plain language re-drafting – facilitative provisions altering spread of hours* [2021] FWCFB 3426 at [3], citing *4 yearly review of modern awards—Plain language project* [2019] FWCFB 5409 at [228].

[114] Section 134(1)(g) of the Act.

[115] See for example clauses 17.2(b) and 17.5.

maximum amount on any given day. This would provide an important protection to employees.

Category 3 – No Facilitative Provision

125. There are a number of modern awards which prescribe a span of hours, but do not permit a facilitative agreement to be reached in respect of varying the span. Of the 25 modern awards identified in the Discussion Paper, 11 awards[116] fall into this category.

126. For the reasons advanced above, modern awards should provide an employer and employee(s) with the flexibility to make a facilitative agreement to alter the span of hours in a manner that better facilitates work and care.

127. Thus, all modern awards (including but not limited to the 11 modern awards referenced above), which contain a prescribed span of hours and do not currently contain a facilitative provision to alter the span, should be varied to permit that to occur by agreement between an employer and employee. For the reasons set out above, such provisions should permit both ends of the span to be expanded.

Category 4 – Alteration to the Span Permitted by Agreement with Multiple Employees Only

128. Some modern awards permit a facilitative arrangement to vary the prescribed span of hours with multiple employees, but do not permit such arrangement to be made with an individual employee only. Plainly, such provisions do not necessarily cater to employees with caring responsibilities, who wish to work ordinary hours before or after the stipulated span of hours.

129. Thus, all awards should permit an expansion to the span of hours by agreement with an individual employee (in addition to any existing ability to alter the span of hours by agreement with multiple employees).

[116] *Aged Care Award 2010,* CS Award*, Fitness Industry Award 2020,* GRIA*, Hair and Beauty Industry Award 2020, Health Professionals and Support Services Award 2020, Higher Education Industry - General Staff - Award 2020, Local Government Industry Award 2020, Nurses Award 2020, Pharmacy Industry Award 2020,* SCHCDS Award*.*

8. QUESTION 4 – WORKING FROM HOME

130. Question 4 is as follows:

> Are there any specific variations needed in modern awards regarding working from home arrangements that are necessary to ensure they continue to meet the modern awards objective?

131. The Australian Bureau of Statistics (**ABS**) data referenced in the Paper makes clear that working from home is more prevalent now than it was prior to the COVID-19 pandemic.[117] In August 2023, 37% of all employed people worked from home regularly, up from 32% before the pandemic.[118] Working from home has clearly become a feature of modern workplaces. Further, many employees wish to work from home as it better enables them to facilitate their caring responsibilities. As stated in the Paper, *'the increase in opportunities to work remotely has expanded employment opportunities, reduced time spent commuting and provided more flexibility to balance work and caring responsibilities'*.[119]

132. As further observed in the Paper, working from home provisions are not generally a feature of modern awards. To that end, awards do not reflect what has become an increasingly common way of working (in at least some parts of the economy).

133. To ensure that awards reflect a *'relevant'* safety net[120] and for the further reasons set out below, awards should be varied as follows to facilitate arrangements that involve working from home:

    (a) An employer and employee may agree that any award term that requires that ordinary hours must be worked *continuously* will not apply where the employee is working from home;

    (b) An employer and employee may agree that an employee can work ordinary hours outside the span of hours from home;

[117] The Paper at [134]-[135] citing ABS, '*Working arrangements'* (December 2023).

[118] ABS, '*Working arrangements'* (December 2023).

[119] The Paper at [135].

[120] Section 134(1) of the Act.

(c) An employer and employee may agree that minimum engagement and payment provisions will not apply where an employee is working from home;

(d) An employer and employee may agree that award provisions regulating *when* meal breaks and rest breaks are to be taken do not apply to the employee when working from home; and

(e) Allowances associated with matters arising from attendance at a designated workplace should not be payable where an employee is working from home.

134. Whilst we have used the term '*working from home*' in this submission; it applies equally where employees are working from another location of their choosing.

Continuous Ordinary Hours and Span of Hours

135. Many employees working from home wish to take breaks (other than meal breaks and rest breaks) during ordinary hours to attend to personal matters. This includes, for example, transporting children to and from school or attending medical appointments with a family member.

136. Some employees may seek to *'make up'* the time spent off work outside the span of hours. This arises most commonly in the context of parents of young children, who wish to spend time with their children when they would otherwise be required to work; and to subsequently *'make up'* this time at night, after their children have gone to bed.

137. Such arrangements clearly assist employees to balance work and caring responsibilities. Many employers are amenable to accommodating such arrangements (and do in fact permit them). However, a strict application of various provisions found in certain awards may prevent their implementation. This is because many awards require that ordinary hours be worked *'continuously'* and / or they prescribe a span of hours that precludes the ability to work ordinary hours beyond it.

138. For example, clause 13.6(a) of the Clerks Award requires ordinary hours to be worked '*continuously*', except for rest breaks and meal breaks. Clause 13.3 requires ordinary hours to be performed between 7:00 am – 7:00 pm on Monday to Friday, or 7:00 am – 12:30 pm on Saturday. Although clause 13.4 permits the spread of ordinary hours to be moved up to one hour earlier or later by agreement,[121] it does not contemplate the performance of ordinary hours of work outside the span of hours in clause 13.3. Further, whilst clause 13.8 provides for an employee to take time off during ordinary hours and make up that time later, the make up time must also be worked during ordinary hours. Any time worked outside the spread of hours attracts overtime rates.[122]

139. The aforementioned framework in the Clerks Award does not provide a '*relevant*' safety net. In particular, it is not consistent with contemporary practices of working flexibly from home. It renders unlawful arrangements that would be of obvious benefit to employees with caring responsibilities.

140. Similar frameworks exist across the modern awards system. For example:

    (a) Clause 14.2(c) of the *Airline Operations – Ground Staff Award 2020* provides that ordinary hours are to be worked '*continuously*', except for meal breaks. The span of hours is 7:00 am – 6:00 pm on Monday to Friday (subject to an ability to alter it by up to one hour by agreement between the employer and majority of employees and to work ordinary hours on weekends by agreement[123]). Any time worked outside the span of hours attracts overtime.[124]

    (b) Clause 15.3 of the GRIA provides that ordinary hours are '*continuous*' except for rest breaks and meal breaks. The span of hours is between 7:00 am – 9:00 pm on Monday to Friday, 7:00 am – 6:00 pm on Saturday and 9:00 am – 6:00 pm on Sunday,[125] with some exceptions for particular

[121] Clause 13.4 of the Clerks Award.

[122] Clause 21.1(c) of the Clerks Award.

[123] Clause 14.2(g) of the *Airline Operations – Ground Staff Award 2020*.

[124] Clause 14.2(f) of the *Airline Operations – Ground Staff Award 2020*.

[125] Clause 15.1 of the GRIA.

workplaces set out in clause 15.2. Any time worked outside the span of hours or in excess of an employee's ordinary hours attracts overtime.[126] There is no specific provision for make-up time in the GRIA.

(c) Clause 17.2(d) of the Manufacturing Award requires ordinary hours to be worked *'continuously*' except for meal breaks. The span of hours is between 6:00 am – 6:00 pm on Monday to Friday, with the ability to work ordinary hours on a Saturday or Sunday by agreement.[127] Although the award contemplates make up time, it must be worked during the spread of ordinary hours.[128] Any time worked outside or in excess of the span of hours generally attracts overtime.[129]

141. In order to ensure that modern awards provide a fair and relevant safety net, they should be varied to ensure they do not preclude the types of arrangements described above. In particular:

(a) Any award provisions requiring that ordinary hours must be worked *'continuously'* should not apply to an employee working from home, where the employer and employee agree to this; and

(b) An employee working from home should be able to work ordinary hours outside the span of hours, where agreed with the employer.

Minimum Engagement / Payment Periods

142. A large number of modern awards contain minimum engagement / payment periods in respect of part-time and casual employees.[130] In the context of employees with caring responsibilities who are working from home, they preclude arrangements involving short periods of work, even if they are sought by an employee.

[126] Clause 21.2 of the GRIA.

[127] Clause 17.2(c) of the Manufacturing Award.

[128] Clause 17.7 of the Manufacturing Award.

[129] Clause 17.2(f) of the Manufacturing Award.

[130] See, for example, the Paper at pages 73 – 81.

143. For example, as described above, an employee may wish to take a two hour break during the afternoon to spend time with their children and work two hours in lieu later in the evening or on the weekend. A provision that requires that an employee must be *'rostered'* or *'engaged'* to work at least three or four hours may prohibit this.[131] Further, award terms that require the *payment* of a minimum amount that exceeds the period of time sought to be worked discourage employers from permitting such arrangements and in any event, apply unfairly to business.

144. Awards should not, in our submission, be a barrier to the implementation of arrangements involving short periods of work in respect of an employee working from home, where agreed between an employer and employee.

145. Further, the key rationale underpinning minimum engagement periods was described as follows by a Full Bench during the 4 yearly review of modern awards: (emphasis added)

> **[399]** Minimum engagement periods in awards have developed in an ad hoc fashion rather than having any clear founding in a set of general principles. However their fundamental rationale has essentially been to ensure that the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance by way of transport time and cost, work clothing expenses, childcare expenses and the like. An employment arrangement may become exploitative if the income provided for the employee's labour is, because of very short engagement periods, rendered negligible by the time and cost required to attend the employment. Minimum engagement periods are also important in respect of the incentives for persons to enter the labour market to take advantage of casual and part-time employment opportunities (and thus engage the consideration in paragraph (c) of the modern awards objective in s.134).[132]

146. That is, the purpose of minimum engagement periods is to ensure employees are sufficiently compensated *'for each attendance at the workplace to justify the expense and inconvenience associated with that attendance'*. This expense and inconvenience do not arise where the employee is working from home or another

[131] See, for example, clauses 10.3 and 11.2 of the *Contract Call Centres Award 2020,* clauses 10.5 and 11.4 of the Clerks Award, clause 10.9 of the GRIA and clauses 10.5 and 11.1 of the *Storage Services and Wholesale Award 2020*.

[132] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [399].

location of their choosing. Therefore, in any event, minimum engagement and payment periods should not apply in such circumstances.

147. It should be ensured that variations of the nature proposed also apply where an employee engages in training or attending meetings remotely (e.g. where an employee attends a meeting virtually or completes online training courses required by their employer). This would facilitate the remote participation of employees in these activities in ways and at times that are convenient to them, taking into account any caring responsibilities.

Timing of Meal and Rest Breaks

148. Many modern awards stipulate *when* employees are permitted to take meal breaks and rest breaks.

149. For example, the Clerks Award states that employees working more than five hours are entitled to one unpaid meal break of between 30 and 60 minutes, to be taken within the first five hours of work.[133]

150. Another example can be found at clause 16.2 of the GRIA, which provides as follows:

> **16.2** An employee who works the number of hours in any one shift specified in column 1 of Table 3—Entitlements to meal and rest break(s) is entitled to a rest break or rest breaks as specified in column 2 or a meal break or meal breaks as specified in column 3.
>
> **Table 3—Entitlements to meal and rest break(s)**

Column 1 **Hours worked per shift**	**Column 2** **Breaks**	**Column 3** **Meal breaks**
4 or more but no more than 5	One 10 minute paid rest break	
More than 5 but less than 7	One 10 minute paid rest break	One unpaid meal break of at least 30 minutes and not more than 60 minutes

[133] Clause 15.3 of the Clerks Award.

7 or more but less than 10	Two 10 minute paid rest breaks (one to be taken in the first half of the shift and one in the second half)	One unpaid meal break of at least 30 minutes and not more than 60 minutes
10 or more	Two 10 minute paid rest breaks (one to be taken in the first half of the shift and one in the second half)	Two unpaid meal breaks of at least 30 minutes and not more than 60 minutes

151. The GRIA prohibits employers from requiring employees to take a rest break or a meal break within the first or last hour of work and from working more than five hours without taking a meal break.[134] Similar provisions are also contained in other awards.[135]

152. Employees who are working from home may wish to take their meal breaks and rest breaks at times of their choosing, including to allow them to accommodate any caring responsibilities. For example, an employee may wish to take their meal break at the same time as their children are eating a meal. Applying the example of the Clerks Award, such an arrangement would not be permitted if the relevant time was after the first five hours of work.

153. Further, some awards provide that rest breaks cannot be combined with meal breaks.[136] In the context of attendance at a designated workplace or in relation to certain types of work, it might be argued that such provisions are necessary to ensure that employees are not required to work for extended periods of time without a break and by extension, they are not unduly fatigued. However, this rationale does not apply with the same force to an employee working from home. In addition, employees working from home who also have caring responsibilities may wish to take a longer break to allow them to attend to personal matters; such as, for example, collecting their child from day care or school.

[134] Clauses 16.5(a) and 16.5(c) of the GRIA.

[135] See, for example, clause 14 of the *Banking, Finance and Insurance Award 2020*, clause 16 of the *Airline Operations – Ground Staff Award 2020,* clause 27 of the SCHCDS Award and clause 14 of the *Storage Services and Wholesale Award 2020*.

[136] See, for example, clause 16.5(b) of the GRIA and clause 14.2 of the *Storage Services and Wholesale Award 2020*.

154. In order to ensure that modern awards provide a fair and relevant safety net, they should be varied to ensure they can accommodate the arrangements described above. Specifically:

(a) Any award provisions that require meal breaks and / or rest breaks to be taken at a particular time should not apply to an employee working from home, where the employer and employee agree; and

(b) An employee working from home should be able to combine a meal break with any rest breaks to which they're entitled, where agreed with the employer.

Allowances

155. The modern awards system provides for various allowances to be paid to employees in particular circumstances. Allowances may be required to be paid on a weekly, hourly or per-shift basis, or provided as a reimbursement. Some allowances are intended to compensate employees for circumstances arising from working at the employer's designated workplace. For example, various awards provide entitlements associated with special clothing or uniforms, that may not be worn where an employee is working from home. Such entitlements should not apply in those circumstances.

156. In our submission, modern awards should be reviewed to ensure all such allowances are not payable where an employee is working from home.

9. QUESTION 5 – A RIGHT TO DISCONNECT

157. Question 5 is as follows:

> Are there any specific variations needed in modern awards regarding a right to disconnect that are necessary to ensure they continue to meet the modern awards objective?

158. Since the Paper was published, the Closing Loopholes No. 2 Act has passed federal parliament and received Royal Assent. The Closing Loopholes No. 2 Act amends the Act in a number of respects, including by providing for a right to disconnect.[137] The Commission is also required to vary all modern awards to insert a right to disconnect term by 26 August 2024.[138] We understand separate proceedings concerning the development of the model term will be commenced shortly.[139]

159. In addition, during proceedings held on 21 February 2024 concerning this stream of the Review, Deputy President O'Neill indicated that she does not propose to deal with the right to disconnect in the consultation process for this matter, in light of these legislative changes.[140] For these reasons, we have not addressed the right to disconnect in these submissions.

[137] Part 8 of Schedule 1 to the Closing Loopholes No. 2 Act.

[138] Division 5A of Part 17 of Schedule 1 to the Closing Loopholes No. 2 Act.

[139] President's Statement*, Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024,* dated 27 February 2024 at [33] – [36].

[140] Transcript of proceedings on 21 February 2024 at PN120.

10. QUESTION 6 – MINIMUM PAYMENT PERIODS

160. Question 6 is as follows:

> Are there any specific variations to the minimum payment periods for part-time employees in modern awards that are necessary to ensure they continue to meet the modern awards objective?

161. The submissions that follow focus on part-time employment, given that question 6 is limited to part-time employees. However, many of the contentions we advance apply equally to minimum engagement periods for casual and full-time employees. Accordingly, they should be considered in respect of those other forms of employment too.

162. Provisions concerning minimum engagement and payment periods should be varied such that:

(a) The relevant period can be reduced by agreement between the employer and an employee; and

(b) Minimum engagement periods for ordinary hours can be satisfied by either providing a minimum period of work or by providing a minimum payment of the equivalent amount.

Facilitative Provisions

163. The vast majority of minimum engagement / payment clauses contained in awards do not provide for the relevant period to be able to be reduced. This is reflected in the analysis contained in Table 6 in the Paper, in respect of the 25 awards examined in the Paper.

164. Further, as found in a decision of a Full Bench of the Commission during the Modern Awards Review 2012, the model flexibility term does not enable an IFA to be made in respect of minimum engagement periods:

> **[110]** The starting point in resolving the existing uncertainty is to ascertain the intention of the 2008 AIRC Full Bench when it determined the scope of the model clause. In deciding that award terms dealing with arrangements for when work is performed would be within the scope of the model clause the AIRC Full Bench made reference to paragraph 576J(1)(c) of the WR Act. A provision in the same terms is now in s.139(1)(c) of the FW Act and it provides:

> "(1) A modern award may include terms about any of the following matters:
>
> …
>
> (c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours."

[111] It is tolerably clear that the AIRC Full Bench intended that the reference to 'arrangements for when work is performed' would include the matters specifically identified in s.576J(1)(c), of the WR Act (now s.139(1)(c) of the FW Act), that is 'hours of work, rostering, notice periods, rest breaks and variations to working hours'.

…

[114] First, contrary to VECCI's submission, s.139(1)(c) is not the only source of power for minimum engagement periods in modern awards. Properly understood such provisions deal with minimum wages (s.139(1)(a)) or are incidental (within the meaning of s.142) to casual employment (s.139(1)(b)). This characterisation is apparent from a consideration of the minimum engagement term in the *Clerks—Private Sector Award 2010*, which is the award VECCI is seeking to vary. The relevant clause is clause 12.4 and appears under the heading, Casual Employment:

> "12.4 Casual employees are entitled to a minimum payment of three hours' work at the appropriate rate."

[115] This provision is clearly dealing with minimum wages for casual employees, it is not dealing with arrangements for when work is performed.

[116] The second reason for rejecting VECCI's contention flows from a plain reading of the expression 'arrangements for <u>when</u> work is performed' [emphasis added]. A minimum engagement term says nothing about 'when work is performed', it simply prescribes the minimum payment to be made to casual employees for each engagement.[141]

165. It follows from the Commission's reasoning that an award term that prescribes a minimum *payment* period for part-time or casual employees also cannot be the subject of an IFA.

166. In submissions Ai Group filed as part of the '*Making Awards Easier to Use'* stream of the Review, we proposed the introduction of facilitative provisions which would allow minimum engagement / payment periods to be reduced by agreement between an employer and employee.[142] We advanced this proposal in respect of the minimum engagement / payment periods for ordinary hours in the five awards considered in that submission, and also suggested it be

[141] *Modern Awards Review 2012 – Award Flexibility* [2013] FWCFB 2170 at [110] – [111] and [114] – [116].

[142] Ai Group submission dated 22 December 2023 at [31] – [40].

considered in respect of minimum engagement and payment terms across the modern awards system.[143] We repeat that submission in this stream of the Review.

167. Varying awards to include facilitative provisions allowing minimum engagement / payment periods applying to ordinary hours and overtime to be reduced by agreement would promote the implementation of mutually beneficial arrangements. Specifically, they would better enable employees with caring responsibilities to participate in paid employment, by enabling them to perform work for short periods of time. They might otherwise be prevented from engaging in work at those times.

168. Whilst it might be argued that awards that require a minimum *payment* do not, as such, require that employees be provided with an equivalent period of work; this ignores the impact on employers from having to pay the relevant amount to employees in circumstances where they are not performing productive work.

169. The facilitative provisions we have proposed would only apply where there is mutual agreement between an employer and employee. This creates an important safeguard. An employer would not be at liberty to unilaterally reduce the relevant minimum engagement / payment periods. Moreover, under most awards, a part-time employee's hours of work (and any changes to them) must be agreed with the employee, in any event.

Satisfying the Minimum Engagement Period by Making a Payment

170. Many awards require employers to *'roster'* or *'engage'* (however described) employees to work a minimum number of hours on each shift or engagement.[144] Where an employer does not direct an employee to perform the prescribed number of hours of work, such a requirement would not be satisfied, even if the employer paid the employee for the minimum period. This is somewhat

[143] Ai Group submission dated 22 December 2023 at [40].

[144] See, for example, clause 10.4(e) of the CS Award, clause 10.5 of the Clerks Award, clause 10.9 of the GRIA, clause 15.2(a) of the *Hospitality Industry (General) Award 2020* and clause 10.2 of the Manufacturing Award.

anomalous and may preclude employers from offering employees shorter periods of work (e.g. where an employee cannot work for longer due to their caring responsibilities).

171. To address this, we submit that all minimum engagement periods for ordinary hours should be varied so the relevant obligations can be satisfied by either providing a minimum period of work or by providing a minimum *payment* of the equivalent amount. Of course, the conversion of any minimum engagement provisions to a minimum payment provision ought not require that the relevant payment is made in circumstances where the employee is not *'ready, willing and able'* to work for the entire duration of the relevant period.

11. QUESTION 7 – SPAN OF HOURS

172. Question 7 is as follows:

> Are there any specific variations to span of hours provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

173. We refer to our submissions and proposals in response to question 3 above.

174. In addition, the Paper notes that some modern awards limit the performance of ordinary hours to weekdays. That is, they do not contemplate the performance of ordinary hours on weekends.[145]

175. Given the increasing incidence of businesses operating 7 days a week, awards should be varied to include an ability to perform ordinary hours throughout weekends. We accept that it may be necessary for appropriate penalty rates to apply in relation to the performance of such work (or at least that the expansion of ordinary hours absent a requirement to pay penalty rates would be a significant step, the industrial merit of which would both be less apparent and likely be the subject of robust contest).

176. Many employees are amenable to, or indeed would prefer to, work on weekends *vis-à-vis* weekdays. The reasons for this include:

    (a) The opportunity to work at times that attract penalty rates;

    (b) Greater availability of parents, because another family member is available to care for their children; and

    (c) Greater availability of those with study commitments.

177. The prohibition on working ordinary hours on a weekend reflects a bygone era. Since then, community expectations and social mores related to working arrangements and patterns have changed significantly. Society's perception of working on weekends has evolved and with that, so too should awards.

[145] The Paper at [169].

12. QUESTION 8 – NOTICE OF ROSTERS

178. Question 8 is as follows:

> Noting the Work and Care Senate Committee Recommendation 21 that all employees should have at least 2 weeks' notice of their roster except in exceptional circumstances, are there any specific variations to rostering provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

179. Ai Group would strongly oppose the introduction of a minimum notice period of two weeks, as suggested by the Work and Care Senate Committee. We refer to and rely upon section 3 of this submission regarding our overarching concerns about the relevance of the recommendations to this Review. More particularly; the introduction of a minimum two week notice period would have a potentially deleterious impact on employers. There are numerous obvious reasons why employers genuinely require greater flexibility when preparing and varying rosters. This includes a need to accommodate for fluctuating customer demand, changing staffing requirements, unexpected staff absences and a plethora of other operational challenges. Further, employers are already required to consult employees about proposed changes to rosters and ordinary hours of work, which provides a meaningful mechanism for ensuring that employees are informed of, and have an opportunity to be heard in respect of, proposed roster changes.

180. It is also relevant that the vast majority of awards do not presently regulate the provision of rosters or the circumstances in which rosters may be varied. This is entirely appropriate. They are matters that are best determined at the enterprise-level, taking into account matters such as the nature of the employer's operations and the manner in which the employer seeks to arrange labour to ensure that it is deployed efficiently and productively. A one-size-fits-all proposition that seeks to prescribe how and when rosters are to be published and / or varied would be plainly ill-suited to the awards safety net, which covers a vast array of industries and occupations.

181. Rather, in our submission, where relevant, awards that contain pre-existing rostering provisions should be varied as follows:

(a) To permit an employer and employee to agree to a roster variation, at any time; and

(b) To provide a unilateral right for an employer to vary the roster with a short period of notice in the event of unforeseen circumstances.

Variation of Rosters by Agreement

182. Of the awards that contain rostering provisions, many of them stipulate a notice period for any variation to the roster. Some of these are identified in the Paper.[146] In some cases, the award permits variations of the roster without providing the relevant notice period where the employer and employee agree to the variation.[147]

183. In our submission, awards which currently do not permit variations to an employee's roster by agreement between the employer and the employee, without the provision of notice, should be varied to include such provisions.

184. There are many reasons why these arrangements would be beneficial to both employers and employees balancing work and care, who may seek changes to a roster at short notice. For example, an employee may seek attend a medical appointment with a relative or to attend to a matter at a child's school. It would also facilitate *'shift swaps'* agreed between employees, enabling one or both of them to attend to caring responsibilities without needing to access paid or unpaid leave entitlements.

[146] The Paper at pages 105 – 107.

[147] See, for example, clause 21.7(b)(i) of the CS Award, clause 13.6(d) of the *Cleaning Services Award 2020*, clause 25.5(d)(ii)(A) of the SCHCDS Award and clause 15.2(c)(i) of the *Hair and Beauty Industry Award 2020*.

185. Provisions of this type would apply fairly to employees and employers. In addition to providing an avenue for employees to seek changes to a roster at short notice, they would enable an employer to make changes on account of operational needs, provided they are agreed by the employee.

Roster Variation in Unforeseen Circumstances

186. Some awards with rostering provisions also provide a unilateral right for employers to change the roster with limited notice in unforeseen circumstances.[148] The relevant awards that do so within the 25 modern awards are identified in the Paper.[149] To the extent that awards with rostering provisions do not already provide for a right for the employer to change the roster at short notice in unforeseen circumstances, they should be varied to do so.

187. There are many examples of the types of unexpected circumstances which require an employer to respond quickly to make changes in order to continue its operations. These include:

(a) Unexpected changes in customer demand, for example in the retail sector around festive periods (such as Easter and Christmas), customer demand may be higher;

(b) Unanticipated changes in production volume;

(c) Unexpected absences of other employees;

(d) Urgent maintenance or repair being required to plant or equipment necessary for an employee's work; and

(e) Unexpected weather events and their related effects which may prevent particular work from taking place.

[148] See, for example, clause 15.2(c)(ii) of the *Hair and Beauty Industry Award 2020*, clause 22.6(c) of the *Aged Care Award 2010*, clause 14.1(b) of the *Health Professionals and Support Services Award 2020*, and clause 25.5(d)(ii)(B) of the SCHCDS Award.

[149] The Paper at pages 107 – 109.

188. Employers should be able to respond to these unforeseen changes by being permitted to change rosters with a limited period of notice (e.g. 24 hours). Moreover, this flexibility would better enable short notice requests by an employee to be absent from work due to caring responsibilities. For instance, an employer may be more inclined to permit an employee to finish work early at short notice due to an unexpected need to attend to a personal matter if they have a corresponding ability to vary the roster to require another employee to work in their place.

13. QUESTION 9 – AVAILABILITY & GUARANTEED REGULAR HOURS

189. Question 9 is as follows:

> Are there any specific variations to guaranteed hours or availability of hours provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

190. Ai Group does not propose any variations in this regard.

14. QUESTION 10 – OVERTIME, TOIL & MAKE-UP TIME

191. Question 10 is as follows:

> Are there any specific variations to overtime, TOIL or make-up time provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

192. In response to question 10, we submit that awards should be varied as follows:

(a) To include a provision allowing for make-up time in awards which do not currently include such a provision;

(b) Vary the model time off in lieu of overtime (**TOIL**) clause to provide for a standing agreement to be reached between an employer and employee for multiple instances of overtime; and

(c) Vary the model TOIL clause to permit an employer and employee to extend the period over which accrued TOIL must be taken, by agreement.

Make-Up Time

193. As observed in the Paper, some but not all modern awards provide for make-up time.[150] The ability to take time off during ordinary hours and make-up that time at a later stage provides obvious flexibility for employees who have caring responsibilities[151] and provides a mechanism for employees to take time off, without utilising their accrued leave entitlements. It can permit employees to attend to caring responsibilities during ordinary hours (such as after school activities, like music recitals and sport with their children, or attending medical appointments) and work those hours at a later stage.

194. Further, in our submission addressing question 4 in the Paper, we explained how make-up time is particularly relevant in the context of employees who work from home.

[150] The Paper at [202].

[151] The Paper at [200].

195. The Paper speculates that *'there is potential for employers who may encourage employees to work extra hours without appropriate compensation'*.[152] Despite the pre-existence of make-up time provisions in a number of awards, there does not appear to be any evidence of this in fact occurring.

196. In our submission, awards that do not currently provide for make-up time should be varied to include such a provision. The relevant provision in the Manufacturing Award is as follows and may be an appropriate form of words for other awards (provided that subclause (b) below would not be relevant in the context of awards that do not provide for shiftwork):

> **17.7 Make up time**
>
> **(a)** An employee may elect, with the consent of the employer, to work make up time under which the employee takes time off during ordinary hours, and works those hours at a later time, during the spread of ordinary hours provided in this award.
>
> **(b)** An employee on shiftwork may elect, with the consent of their employer, to work make up time under which the employee takes time off during ordinary hours and works those hours at a later time, at the rate which would have been applicable to the hours taken off.

197. We note that the Paper refers to the ability for employers and employees to use the model flexibility term to enter into make-up time arrangements.[153] In our submission, implementing IFAs with individual employees has numerous limitations. For example, it may be necessary to enter into a separate IFA each time an employee seeks to access make-up time. As a consequence, and in any event, the regulatory burden associated with the arrangement would be far greater than conforming with an award clause in the terms proposed. Further, such a clause has the obvious benefit of clearly signposting that make-up time is available under the award.

[152] The Paper at [200].

[153] The Paper at [201].

Time off in Lieu of Overtime

198. As observed in the Paper, the model TOIL clause requires written agreement between an employer and an employee.[154] A separate written agreement is required for each pay period during which overtime worked by an employee is to be taken as time off in lieu.[155]

199. In our submission, this framework should be varied in all awards to allow for an employer and employee to reach a standing agreement for multiple instances of overtime to be taken as time off in lieu, across more than one pay period. This would ease the regulatory burden on both employers and employees. It would also provide more certainty to employees by knowing that the employer has agreed to the accrual of TOIL over the specified period of time.

200. Further, as identified in the Paper, awards impose limits within which TOIL must be used.[156] The 25 awards contain time limits of between four weeks and six months. In our submission, awards should be varied to permit an employer and employee to agree that their TOIL will be '*banked*' for a longer time period.

201. The proposed variation would facilitate an employee taking the time off at a time that better suits them, rather than within the limited window set by the award. This would be of benefit to employees with caring responsibilities who may, for example, wish to take an extended period of time off over school holiday periods. It would also better enable them to preserve accrued leave entitlements.

[154] The Paper at [190].

[155] See, for example, clause 23.2 of the Clerks Award, clause 32.8 of the Manufacturing Award, clause 23.3(b) of the CS Award.

[156] The Paper at [191].

15. QUESTION 11 – ON-CALL AND RECALL TO DUTY

202. Question 11 of the Paper asks:

> Are there any specific variations to on-call or recall to duty provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

203. Ai Group does not advance any proposals in response to question 11.

16. QUESTION 12 – TRAVEL TIME

204. Question 12 is as follows:

> Are there any specific variations to travel time provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

205. Many awards do not contain any *'travel time provisions'* and amongst those that do, there are significant variances between them. This is consistent with the observations made in the Paper about the 25 awards analysed therein.[157]

206. The development of award terms concerning payment for travel is an inherently complex task. For example, it involves various difficulties associated with developing a method of calculating distance travelled and / or time spent travelling; as well as providing for various factors that can impact the time or distance, such as the route taken and traffic.

207. The Paper specifically mentions that the SCHCDS Award does not entitle employees to payment for time spent travelling. This issue was, however, the subject of major proceedings during the 4 yearly review of awards. Ultimately, a number of union claims, which were strongly opposed by Ai Group, were dismissed by the Commission. Relevantly, the Commission highlighted the extent to which the availability and quantum of payments associated with travel are interrelated with other award entitlements: (emphasis added)

> **[244]** …There is an interrelationship between the remuneration for broken shifts and travel time. In setting the broken shift allowances, we have taken into account the additional travel time associated with effectively presenting for work on 2 occasions. It follows that if the SCHADS Award is subsequently varied to provide a payment for travel time, the quantum of the broken shift allowances may require downward adjustment.[158]

208. The issues and complexities set out above are currently being considered by the Commission in an application to vary the SCHCDS Award, made by an employee.[159] The submissions filed by Ai Group in those proceedings[160]

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[157] The Paper at [207] – [209].

[158] *4 yearly review of modern awards — Social, Community, Home Care and Disability Services Industry Award* [2021] FWCFB 5641 at [244].

[159] AM2023/11 Application to vary the SCHCDS Award.

[160] Ai Group submissions dated 20 December 2023.

comprehensively detail the difficulties identified above and explain the bases for our opposition to the application.

209. For the reasons set out above, any proposal to introduce new entitlements in respect of payment for travel in this Review would be strongly opposed by Ai Group. Further, it would not be appropriate for the issue of travel in the SCHCDS Award to be dealt with in this Review given the aforementioned proceedings.

17. QUESTION 13 – ANNUAL LEAVE

210. Question 13 is as follows:

> Are there any specific variations to annual leave provisions in modern awards, for example annual leave at half pay, that are necessary to ensure they continue to meet the modern awards objective?

211. It is uncontroversial that access to various forms of leave can assist employees to balance work and caring responsibilities.[161] As observed in the Paper, most modern awards provide for the NES entitlement to four weeks' annual leave (or five weeks for shiftworkers if relevant) for employees who are not casual employees.[162]

212. As the Paper explains, the Commission varied a number of awards on its own motion and on application by interested parties to provide flexibility on a temporary basis in response to the COVID-19 pandemic.[163] The most significant example of this was the insertion of *Schedule X – Additional measures during the COVID-19 pandemic* (**Schedule X**) into 99 modern awards on the Commission's own motion on 8 April 2020.[164] Relevantly, Schedule X provided for annual leave at half pay. Schedule X ceased operation on 30 June 2022.[165]

213. The annual leave provisions in the NES do not contemplate an employee taking a longer period of annual leave at a proportionately reduced rate of pay.[166] Rather, the employer is required to pay an employee the applicable base rate of pay for their ordinary hours of work in the period of annual leave.

214. In response to question 13, we submit that modern awards should be varied to permit an employer and an employee to agree to the employee taking up to twice as much annual leave at a proportionately reduced rate of pay.

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[161] The Paper at [224].

[162] The Paper at [228]; Section 87 of the Act; See, for example, clause 26 of the *Airline Operations – Ground Staff Award 2020*, clause 32 of the Clerks Award and clause 34 of the Manufacturing Award.

[163] The Paper at [229].

[164] *Variation of Awards on the initiative of the Commission* [2020] FWCFB 1837.

[165] *COVID-19 Award Flexibility – Schedule X and award-specific schedules* [2022] FWC 1531.

[166] Sections 88 and 90 of the Act.

215. The proposed variation would be beneficial for employees balancing work and caring responsibilities. It would facilitate a longer period of approved absence from the workplace in circumstances where the employee may have insufficient accrued annual leave. For example, parents of school age children may wish to take annual leave to care for their children during the summer school holidays, which typically last for more than four weeks. If our proposal were adopted, an employee with three weeks' accrued annual leave could, by agreement, take annual leave for six weeks at half pay during this time.

216. Although unpaid leave may be available to employees in these circumstances, it would not provide continuity of earnings throughout the period of leave. There is also no *entitlement* to take unpaid leave. This is in contrast to the annual leave provisions in the NES, which require that *'an employer must not unreasonably refuse to a request by the employee to take paid annual leave*'.[167]

217. Our proposal would also allow employees to use annual leave to supplement other leave types. For example, an employee may be required to care for a child or relative experiencing an extended illness. The duration of these caring responsibilities may not be able to be accommodated within the employee's accrued personal / carer's leave entitlement. As there is no restriction on the circumstances in which employees can take annual leave, an employee in this position who has exhausted any personal / carer's leave entitlement could request an extended period of annual leave at a reduced rate of pay.

218. Our proposal that awards be varied to provide an entitlement for an employee to take *'up to*' twice as much leave is intended to provide as much flexibility as possible. For example, it would facilitate an employee taking 25% more annual leave for 25% reduced pay.

219. If the Commission is minded to vary awards in the manner we have suggested, it will be necessary to carefully consider and address any unintended, unjustifiable or otherwise problematic consequences. For example, in our submission it would be inappropriate for employees to progressively accrue other

[167] Section 88(2) of the Act.

types of leave on the basis of their normal ordinary hours during a period of annual leave at reduced pay. Such employees should instead be deemed to have proportionately reduced ordinary hours during the relevant period. This would ensure other types of leave accrue at a proportionate rate. Other potential unintended consequences could be explored further during the consultation sessions scheduled before the Commission.

18. QUESTION 14 – PERSONAL / CARER'S LEAVE

220. Question 14 is as follows:

> Are there any specific variations to personal/carer's leave provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

221. Ai Group does not propose any variations in response to question 14. We note that typically, awards do not deal with personal / carer's leave. We would oppose any expansion or extension of existing entitlements.

19. QUESTION 15 – DEFINITION OF IMMEDIATE FAMILY

222. Question 15 is as follows:

> Noting the Work and Care Final Report Recommendation 17, that the definition of immediate family should be expanded, are there any specific variations in modern awards that are necessary to ensure they continue to meet the modern awards objective?

223. In response to question 15, we refer to chapter 3 of this submission. For the reasons there set out, it would not be appropriate for awards to seek to expand the definition of *'immediate family'*.

20. QUESTION 16 – UNPAID CARER'S LEAVE

224. Question 16 is as follows:

> Having regard to the Productivity Commission's suggestion for more flexible working arrangements as an alternative to extended unpaid carer's leave, are there any specific variations in the modern awards that are necessary to ensure they continue to meet the modern awards objective?

225. Ai Group does not propose any variations in response to question 16. We note that employees with caring responsibilities can generally already make a request for flexible working arrangements pursuant to s.65 of the Act.

21. QUESTION 17 – PERSONAL / CARER'S LEAVE

226. Question 17 is as follows:

> Noting Senate Committee Recommendation 18, to consider separating personal/carer's leave entitlement, are there any specific variations in modern awards that are necessary to ensure they continue to meet the modern awards objective?

227. Recommendation 18 should not be adopted, including for the reasons set out in chapter 3 of this submission.

22. QUESTION 18 – CEREMONIAL LEAVE

228. Question 18 is as follows:

> Are there any specific variations to ceremonial leave provisions in modern awards that are necessary to ensure they continue to meet the modern awards objective?

229. Ai Group does not propose any variations in response to question 18.

23. QUESTION 19 – OTHER VARIATIONS

230. Question 19 is as follows:

> Are there any other specific variations to modern award provisions that would assist employees meet their caring responsibilities and are necessary to meet the modern awards objective?

231. Ai Group does not advance any proposals in response to question 19; but reserves its right to do so in response to the submissions filed by other interested parties.