

Australian Industry Group

Modern Awards Review 2023 – 24  
Work & Care

**Submission – Literature Review**  
(AM2023/21)

26 April 2024



# AM2023/21 MODERN AWARDS REVIEW 2023 – 24

## WORK AND CARE

### 1. INTRODUCTION

1. On 24 November 2023, the President released a Statement<sup>1</sup> announcing the Fair Work Commission (**Commission**) had engaged Western Sydney University to produce a report, ostensibly in the form of a literature review (**Literature Review**) to support the '*Work and Care*' stream of the Modern Awards Review 2023 - 24 (**Review**).
2. On 29 January 2024, the Commission released a further Statement<sup>2</sup> foreshadowing its intention to publish the Literature Review on 8 March 2024, and providing interested parties with an opportunity to make submissions on the Literature Review during the consultation window for the '*Work and Care*' stream of the Review from 11 March to 12 April 2024.<sup>3</sup>
3. In accordance with the aforementioned Statement, the Literature Review was released by the Commission on 8 March 2024. On the same date, the Commission released a third Statement<sup>4</sup>, in which it stated that interested parties had an opportunity to make written submissions on the Literature Review in parallel with reply submissions for the '*Work and Care*' stream of the Review, by no later than 12:00pm on 26 March 2024.<sup>5</sup>
4. On 26 March 2024, the Australian Industry Group (**Ai Group**) filed its Reply Submission. In its Reply Submission, Ai Group sought an extension of time to file a submission in response to the Literature Review, until 4.00pm on 26 April 2024 (including setting out the basis for this request).<sup>6</sup>

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<sup>1</sup> [2023] FWCFB 218 (**November Statement**).

<sup>2</sup> [2024] FWC 213 (**January Statement**).

<sup>3</sup> January Statement at [4].

<sup>4</sup> [2024] FWC 607 (**March Statement**).

<sup>5</sup> March Statement at [4].

<sup>6</sup> Reply Submission at [20] – [24].

5. Ai Group's request was granted by Deputy President O'Neill on 3 April 2024, during the first day of consultation in the Work and Care stream of the Review.<sup>7</sup> This submission is filed accordingly.
6. Notwithstanding the extension of time we have been afforded, Ai Group's submission has been prepared within a very limited timeframe, noting our extensive involvement in a large number of other concurrent proceedings (including in relation to the Review). In the time available, it has not been possible to fulsomely consider the source material drawn upon in the Literature Review, given the vast expanse of material considered.
7. Nonetheless, this submission identifies our key concerns in relation to:
  - (a) The scope of the Literature Review;
  - (b) The period of time over which the relevant literature has been selected;
  - (c) Reliance on the Interim and Final Reports of the Senate Select Committee on Work and Care (**Work and Care Senate Committee**); and
  - (d) Consideration s associated with procedural fairness considerations.
8. Having regard to the concerns outlined above, Ai Group submits that the Literature Review ought to be given little (if any) weight by the Commission.
9. With respect to the:
  - (a) Substantive proposals contained in the literature underpinning the report;
  - (b) Conclusion in the Literature Review that *'[m]uch of the literature considered in this review suggests that changes need to be made to the basic architecture of NES and modern award working time provisions of the FW Act to better support worker-carers'*; and

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<sup>7</sup> Transcript at PN9.

(c) Summary of '[i]ndicative proposals to improve work care outcomes for employees' contained in Appendix 1 to the Literature Review;

we note that many of these overlap with proposals advanced in submissions filed by union parties in the '*Work and Care*' stream of the Review, and/or as contained in the Commission's Discussion Paper<sup>8</sup> (and in particular, the references to the Work and Care Senate Committee Reports contained therein). Ai Group does not repeat its position in response to those proposals in this submission and instead, relies upon its submissions previously filed in the '*Work and Care*' stream of the Review on 12 March 2024 ([Submission](#)) and 26 March 2024 ([Reply Submission](#)).

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<sup>8</sup> Discussion Paper published by the Commission on 29 January 2024.

## 2. SCOPE OF LITERATURE REVIEW

10. As the Literature Review itself notes, its scope is relatively narrow.<sup>9</sup> We deal with two aspects of the scope of the review in the submissions that follow.

### Focus on employee perspectives

11. Relevantly, the ‘aim’ of the Literature Review was to: (our emphasis)

- Analyse existing literature on modern awards and National Employment Standards (NES) framework in the Fair Work Act 2009 (Cth) (FW Act) and their impact on employees’ work and care responsibilities;
- Identify and synthesise the key findings, trends, and emerging themes in the field; and
- Analyse existing literature to highlight various factors influencing the relationships between these workplace relations settings and employees’ ability to balance their work and care responsibilities.<sup>10</sup>

12. Evidently, the Literature Review was – by design – directed at synthesising research on the *employee* experience with respect to balancing work and care. Much of the literature reviewed by the authors focused on worker-carer experiences.<sup>11</sup> We note that interested parties participating in the Review were not afforded an opportunity to make submissions about the terms of reference that ultimately guided the Literature Review before it was conducted.

13. The discussion in the Literature Review regarding the ‘[s]election of sources’ states that: (our emphasis)

Publications identified for detailed review included those in which work and care in the Australian context is the main topic or one of the main topics. That is, those that, at least in part, deal explicitly or implicitly with the impacts of terms and conditions in the NES and modern award system on employees’ work and care responsibilities as well as the enforcement of these terms and conditions.<sup>12</sup>

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<sup>9</sup> Literature Review at pages 1 and 57.

<sup>10</sup> Literature Review at page 1.

<sup>11</sup> As noted in the Literature Review at page 60.

<sup>12</sup> Literature Review at page 2.

14. There is a notable absence in the Literature Review of any consideration of employers' experiences with respect to factors which facilitate or constrain their ability to support employee carers, or the impact of any efforts made to support such employees including, for example, through the provision of flexible working arrangements.
15. By way of example, the Literature Review is described as relating to the second of three 'levels' of Australian work-care regulatory institutions, being the level concerned with '*both the pay and conditions of work set out for most Australian casual, full-time and part-time worker-carers in modern awards and the NES in the FW Act, as well as the regulatory 'adaptions' or measures set out in these provisions to accommodate them*'.<sup>13</sup>
16. However, the '*third level*' is described as being: (footnotes omitted, our emphasis)

...where labour law regulation takes effect and 'where local enterprise, worksite, and immediate supervisory factors are the filter through which regulation's reach is either observed or obstructed, and where the mismatch between workplace structures and expectations and the needs of working carers is most evident'. The workplace level, strongly influenced by industry norms, is also where the organisation of work, employer policy and practice and organisational 'work-life culture', shape workers' access to work-care 'adaptions' and also influence longer-term consequences across the life course for worker-carers, both those who can access such adaptions and those who cannot.<sup>14</sup>
17. This '*third level*' of work-care regulatory institution – and in particular, the experiences of employers in applying conditions set out in modern awards and the National Employment Standards (**NES**), having regard to the manner in which work needs to be organised and operational practices at the workplace level – is a critical consideration, but one that does not feature in the Literature Review.
18. Further, in the context of source selection, the authors of the Literature Review state that for the purposes of considering submissions to the relevant Senate Committee and Productivity Commission Inquiries from 2014 – 2023, they were '*asked to focus, in the main, on submissions from academics, advocacy and*

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<sup>13</sup> Literature Review at page 9.

<sup>14</sup> Literature Review at page 9.

*other organisations*' on the basis that peak employer groups and unions will be involved in consultations and making submissions in the '*Work and Care*' stream of the Review.<sup>15</sup> Accordingly, the discourse in the Literature Review concerning submissions made to those Inquiries is notably lacking with respect to employers' perspectives.

19. As a consequence, the Literature Review primarily considers employee needs and perspectives, to the exclusion of employers' perspectives. Neither the aim of the Literature Review, nor the resultant report, involve a balanced assessment as to both the employee and employer experience of the existing workplace relations framework and settings (and specifically, as contained in the *Fair Work Act 2009 (Act)* and modern awards).
20. By way of example, when describing the '*Australian labour market context*':
  - (a) The use of casual employment by worker-carers to manage work and care is described solely by reference to perceived detriments of casual work, without any reference to benefits that may co-exist;<sup>16</sup>
  - (b) Similarly, arrangements which permit casual or part-time employees to flex their hours of work up or down from agreed or minimum hours are described in only negative terms, notwithstanding there may be mutual benefit to employers and employee carers of such arrangements;<sup>17</sup> and
  - (c) The increasing use of technology by employers to roster staff based upon forecasting customer demand and matching available labour is described as a method of facilitating the '*fissuring or fragmentation of working time arrangements*' of employees.<sup>18</sup> The report fails to note the many benefits that flow from the use of such technology, including more accurate projections of labour needs and optimising efficiency.

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<sup>15</sup> Literature Review at page 2.

<sup>16</sup> Literature Review at page 14.

<sup>17</sup> Literature Review at page 15.

<sup>18</sup> Literature Review at page 16.

21. In the circumstances, it is unsurprising that the Australian Council of Trade Unions and its affiliates have sought to rely on various aspects of the Literature Review in support of the submissions they have advanced in the Review (however, the same could not be said of the employer interests).

#### Omission of consideration of discrimination law framework

22. The Literature Review identifies that in practice, the way in which the Act operates in shaping work and care outcomes interacts with work and care infrastructure and institutions, societal work-care culture, workplaces (including industry and employer-specific considerations and attitudes) and household situations.<sup>19</sup>
23. Notably absent however is any reference to the impact of Australia's system of protections against discrimination at the State, Territory and Federal level and its intersection with entitlements under the Act and modern awards.
24. The exclusion of any specific discussion within the Literature Review concerning the impact of discrimination law in shaping work-care outcomes at various points in the Literature Review results in an insufficiently nuanced consideration of the relevant issues.
25. One example where this omission is particularly stark, is in the context of discussion concerning eligibility limits in relation to the right to request flexible work arrangements under the NES<sup>20</sup> and consideration of the sufficiency of the provisions in light of (amongst other things) the categories of workers that may be excluded from the eligibility requirements.<sup>21</sup>
26. For example, the conclusion to the Literature Review notes that:

Several barriers to the use of both formal and informal requests for flexibility identified by worker-carers underline the importance of workplace policy, practice and culture, particularly the importance of direct supervisors to worker-carers in successfully

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<sup>19</sup> Literature Review at page 57.

<sup>20</sup> See Division 4 of Part 2-2 of the Act.

<sup>21</sup> Eligibility requirements to make a request for flexible work arrangements are contained in s.65(2) of the Act. See discussion of the impact on eligibility limitations in the Literature Review at pages 27 – 32 and 61.



accessing flexible work arrangements that suit their needs. The literature also highlights the consequences of using flexible work arrangements in what has been termed 'flexibility stigma', which is experienced by women and also by men who may wish to work flexibly to manage work and care.<sup>22</sup>

27. This statement fails to have regard to the complex and over-regulated system of discrimination laws in Australia, which provide employees with a significant additional framework through which flexible working arrangements may be negotiated. Contrary to the suggestion above that an employee who is not eligible to make a request for a flexible work arrangement pursuant to the NES (or who may be eligible but encounters a refusal from their employer based on 'reasonable business grounds'<sup>23</sup>) is at the whim of 'workplace policy, practice and culture'; the reality is that employers must also operate within the confines of discrimination laws such that the imposition of a requirement to work in a standard, full-time manner for carers may be unlawful unless the employer is able to prove the requirement is reasonable.<sup>24</sup>
28. In a similar vein, nor does the discussion of 'flexibility stigma' take into account the protection from adverse action for an employee who exercises (or proposes to exercise) a right to request a flexible work arrangement pursuant to the NES<sup>25</sup> contained in s.340 of the Act.

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<sup>22</sup> Literature Review at page 61.

<sup>23</sup> S.65A(5) of the Act.

<sup>24</sup> For example, the *Disability Discrimination Act 1992* (Cth) (**DD Act**) provides protections to a person who has an associate with a disability in the same way as it applies in relation to a person with a disability (s.7(1) of the DD Act). 'Associate' is defined in s.4 of the DD Act as including a spouse of the person, another person who is living with the person on a genuine domestic basis, a relative of the person, a carer of the person, and another person who is in a business, sporting or recreational relationship with the person. Section 6 defines discrimination as including indirect forms of discrimination, for the purpose of the prohibition on discrimination in employment contained in s.15 of the DD Act.

<sup>25</sup> The protection in s.340 of the Act relates to the exercise, or proposed exercise, of 'workplace rights'. Section 341 of the Act defines 'workplace right' and relevantly includes a request for flexible working arrangements made under Division 2 of Part 2-2 of the Act (s.341(2)(i)).

### 3. PERIOD OF TIME OVER WHICH LITERATURE WAS SELECTED

29. The Literature Review draws on sources ranging from as early as 2004,<sup>26</sup> through to 2024, with the authors noting that *'there have been significant changes over time in the extent to which the needs of worker-carers for flexibility might be accommodated through working time and leave provisions in modern awards and the NES'*.<sup>27</sup>
30. Whilst Chapter 6 of the Literature Review acknowledges changes made to the Act by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth) (SJPB Act)* and *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023 (Cth) (Protecting Worker Entitlements Act)* in the context of leave availability and accessibility under the NES, numerous sources are relied upon by the authors that pre-date these changes.
31. For present purposes, relevant changes to the Act arising from the SJPB Act included:
- (a) The model term that was previously found in modern awards regarding requests for flexible working arrangements essentially being incorporated into the NES;
  - (b) The Commission being given new powers to deal with disputes related to flexible work requests; and
  - (c) An expansion of the circumstances in which an employee may request flexible work arrangements.<sup>28</sup>

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<sup>26</sup> See for example the reference to Iain Campbell and Sara Charlesworth, *'Background Report: Key Work and Family Trends in Australia'* (Report, Centre for Applied Social Research, RMIT University, 2004) in the Literature Review at fn 45 on page 12.

<sup>27</sup> Literature Review at page 18.

<sup>28</sup> See Division 4 of Part 2-2 of the Act. A more fulsome description of the changes is contained in our [Submission](#) filed in the Job Security stream of the Review on 5 February 2024 at [76] – [81] inclusive.

32. Various sources have been relied upon by the authors which pre-date the SJBPA Act, in the specific context of the discussion at ‘4.3 – *Right to request flexible working arrangements under section 65 of the FW Act*’ of the Literature Review. For example, part 4.3.2 of the Literature Review describes the results of research concerning the use of right to request provisions conducted in 2012, 2014 and 2015.<sup>29</sup> The Literature Review does not consider the impact on the relevance of, or the weight that can be given to, these sources, in light of the significant changes subsequently made to the right to request flexible work arrangements in the NES by the SJBPA Act.
33. Further, the Literature Review identifies concerns ‘*linked to weaknesses identified in the enforcement and grievance resolution provisions of the right to request*’<sup>30</sup>, referable to literature sources dating from 2014, 2018, 2020 and 2022<sup>31</sup> and which would clearly now be impacted (if not, surpassed) by the SJBPA Act amendments, including in relation to enforcement and grievance resolution mechanisms.
34. Relevant changes to the Act arising from the Protecting Worker Entitlements Act included a greatly enhanced ability of employees to access unpaid parental leave. Such changes complement the recent expansion of entitlements for employees to government-funded paid parental leave, and can be expected to both assist working parents to remain in the workforce and to maintain what may be viewed as more secure forms of employment, such as full-time or part-time employment, given they will provide employees with a greater capacity to balance work and child care obligations without shifting from permanent employment to other, more flexible, working arrangements.
35. The Literature Review describes these changes,<sup>32</sup> but does not contain any analysis as to the continued weight that can be given to these propositions, having regard to the changed statutory landscape.

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<sup>29</sup> Literature Review at page 28.

<sup>30</sup> Literature Review at page 31.

<sup>31</sup> See fn 148 of Literature Review, on page 31.

<sup>32</sup> Literature Review at page 56.

36. Further, the Literature Review contains negligible reference to the extensive changes made to the Act by the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 (Cth) (Closing Loopholes No. 2 Act)*.<sup>33</sup> Specifically, Appendix 1 to the Literature Review is described as containing a ‘*summary snapshot of indicative proposals for change to the National Employment Standards and modern award provisions raised in the literature reviewed for this Report and in advocacy group submissions... [which] focus on the current provisions in the FW Act*’.<sup>34</sup> A footnote to the above explains:

Thus proposals in literature before 2022 which addressed the lack of enforcement mechanisms in NES rights to request both flexible work arrangements and the extension of unpaid parental leave now present in the FW Act are not included here. Further, since the right to disconnect has been very recently inserted in the FW Act via the Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 (Cth), proposals on this right are also not included here. We note that a major case on a model term on the ‘right to disconnect’ in modern awards is now before the FWC. President’s Statement, *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* 27 February 2024, at [33]- [36].<sup>35</sup>

37. Accordingly, outside the context of the summary of proposals in Appendix 1, the Literature Review fails to address more broadly (and within the main body of the report) what impact these changes may have in relation to the ongoing relevance or weight to be given to the source materials considered which pre-date these changes.
38. The Closing Loopholes No. 2 Act further amended the Act by, amongst other things, introducing various changes in respect of casual employment, which will commence operation later this year. In particular, it will result in:
- (a) A new definition of ‘*casual employee*’, by replacing the existing s.15A of the Act with a new definition which will, in essence, narrow the scope for an employer to engage a new employee as a casual employee;

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<sup>33</sup> Whilst further changes were also made to the Act by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023 (Cth)*, for present purposes the amendments made by the Closing Loopholes No. 2 Act are more relevant.

<sup>34</sup> Literature Review at page 63.

<sup>35</sup> Literature Review, fn 275 on page 63.

- (b) 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). 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; and
- (c) A requirement for casual employees to be provided with a copy of the Casual Employment Information Statement with increased frequency, the effect of which is likely to be a 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.

39. Various sources are relied upon by the authors which pre-date the commencement of relevant changes flowing from the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) and Closing Loopholes No. 2 Act, including propositions in respect of which these amendments arguably have a bearing. By way of illustration:

- (a) The discussion concerning literature which draws attention to the consequences of casual status for job insecurity;<sup>36</sup>
- (b) The extent to which casual workers are excluded from the NES right to request flexible work arrangements;<sup>37</sup> and
- (c) The concluding statement that '*the fault line in protections and access to worker-carer adaptations for casual employees is both long-standing and endemic as highlighted in much of the literature reviewed*';<sup>38</sup>

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<sup>36</sup> Literature Review at page 22.

<sup>37</sup> Literature Review at page 24.

<sup>38</sup> Literature Review at page 59.

must be appropriately contextualised and tempered by the changes to the definition of casual employment and new '*casual conversation pathway*', which in practical terms will give casual employees significantly greater power with respect to which side of the so-called '*fault line*' their employment resides.

40. Separately to this, discussion in the Literature Review concerning low guaranteed minimum hours in the disability support sector and lack of compensation for travel time under the *Social, Community, Home Care and Disability Services Industry Award 2010* is supported by sources from 2017, 2018 and 2019<sup>39</sup>, notwithstanding both of these issues were given extensive consideration by the Commission as part of the 4 yearly review of modern awards. Those proceedings resulted in a number of variations being made to the award, which were directed at addressing these very issues.<sup>40</sup>
41. These factors necessarily curtail the relevance of the Literature Review to the Commission's consideration of issues raised in the Review. The submissions advanced by parties in the Review likely (or, at the very least, ought to) reflect more contemporary reflections on the operation of the existing safety net.
42. By extension, the summary of proposals contained in Appendix 1 to the Literature Review is expressed as excluding '*proposals by unions or employer groups as the FWC anticipates that proposals by these parties will be raised in the consultations and submissions as part of the work and care stream of the Modern Awards Review*'.<sup>41</sup> Ai Group submits that proposals advanced during the submission and consultation processes are the appropriate focal point of the Commission's deliberations in the Review.

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<sup>39</sup> Literature Review at fn 193 on page 40 and fn 196 on page 41.

<sup>40</sup> See decisions issued by the Full Bench of the Commission on 4 May 2021 ([2021] FWCFB 2383), 25 August 2021 ([2021] FWCFB 5244), 18 October 2021 ([2021] FWCFB 5641) and 31 January 2022 ([2022] FWC 198).

<sup>41</sup> Literature Review at page 63.

#### **4. RELIANCE ON REPORTS OF THE WORK & CARE SENATE COMMITTEE**

43. The Literature Review draws heavily on the interim report of the Work and Care Senate Committee handed down in October 2022 (**Interim Report**) and a final report handed down in March 2023 (**Final Report**).
44. Our submission filed earlier in the '*Work and Care*' stream of the Review considered the Interim Report and Final Report (including the recommendations contained therein) and their relevance to the Review, at length.<sup>42</sup> We continue to rely on those submissions.
45. Briefly stated, our position is that the reports and recommendations of the Work and Care Senate Committee by no means reflect the outcome of a fair or balanced assessment, that considered the circumstances of both employers and employees. Rather (and similar to the arguments we raise with respect to the Literature Review), 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.
46. At the very least, it is critical that any proposed adoption by the Commission of the recommendations (or part thereof) 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).

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<sup>42</sup> See AI Group submission dated 12 March 2024 at [15] – [52].

## **5. PROCEDURAL FAIRNESS CONSIDERATIONS**

47. Lastly, given the circumstances in which the Literature Review has been commissioned, interested parties have not had an opportunity to cross-examine the authors of the Literature Review, so as to facilitate any proper scrutiny as to the methodology adopted to summarise the literature and/or the basis upon which conclusions contained within the Literature Review were reached. Nor have interested parties been afforded an opportunity to call evidence from other expert witnesses in response to the Literature Review. This departs from the approach typically adopted in contested matters, where a party seeks to rely upon a literature review.
  
48. In the circumstances, it would be deeply unfair to give any meaningful weight to the Literature Review (for example, by relying on any findings contained therein or drawing conclusions from its content). The nature of this process, and the timeframes within which it has been conducted, has not permitted a sufficiently robust assessment of the Literature Review. Accordingly, the Commission should afford it little (if any) weight.