

ACCI Submission

Modern Awards Review 2023-24: Work and Care

12 March 2024



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PART A OVERVIEW

Background

1. On 12 September 2023, the President of the Fair Work Commission (**Commission**), Justice Hatcher received a letter from the Minister for Employment and Workplace Relations, the Hon Tony Burke, MP. The Minister expressed the Government's interest in:

*'... the Fair Work Commission initiating a targeted review of modern awards. The desirability of a review and possible areas for focus arise from outcomes of the Jobs and Skills Summit, changes to the objects, objectives and gender equality provisions of the Fair Work Act 2009 (Fair Work Act) made by the Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (SJBPA Act), workplace recommendations of the National Cultural Policy, Revive, and the Final Report of the Senate Select Committee on Work and Care.'*¹
2. In a statement issued on 15 September 2023, the President announced the commencement of a review of modern awards to be conducted on the Commission's own motion by a 5 Member Full Bench (**Review**).²
3. On 29 January 2024, the Commission published a Discussion Paper: Work and Care ([Discussion Paper](#)) as part of the Review.
4. The Discussion Paper contains 19 questions and Parties have been invited to lodge submissions in response to the Discussion Paper by 12 March 2024.
5. Following those initial submissions, reply submissions must be filed by 26 March 2024 with consultation sessions being conducted on 2, 4, 9 and 10 April 2024, a literature review published on 8 March 2024 with submissions in response due by 26 March 2024 and then an Employer Survey undertaken at some point on a date to be named.
6. As the literature review was only published on 8 March 2024, the Australian Chamber of Commerce and Industry (**ACCI**) has not had the opportunity to consider its findings and does not engage with that review

¹ Letter from the Hon Tony Burke, Minister for Employment and Workplace Relations and Minister for the Arts to Hatcher J, President of the Fair Work Commission, 12 September 2023.

² President's Statement, Fair Work Commission, 15 September 2023.

in this initial submission.

ACCI's Position

7. ACCI's position can be distilled to 6 broad points:
 - a) The modern awards objective requires the creation of a fair and relevant minimum safety net for **both** employers and employees.
 - b) Fairness (and the practical operation of businesses within the economy) requires that there be an appropriate **balance** of accommodating the personal needs of employees who undertake caring responsibilities with their working obligations and the needs of their employer.
 - c) The current *Fair Work Act 2009* (Cth) (**Fair Work Act**) contains a broad range of considerable (and recently extended) rights, entitlements and protections for workers with caring responsibilities and it is not apparent that these are insufficient, unbalanced or require improvement for the satisfaction of the modern awards objective (which is the relevant standard of assessment).
 - d) The desire for 'flexibility' to accommodate caring responsibilities should be understood not simply as an exercise in providing employees with more rights and entitlements, but as an exercise in creating practical and useable flexibility in the modern system so that *both* employees and employers can use the modern awards system to create suitable working arrangements, especially for those with caring responsibilities.
 - e) In the limited context of 'working from home', there is merit in allowing employees and employers to *agree* that work can be performed flexibly, by removing the potential 'penalty' imposed on an employer for providing that flexibility.
 - f) In the context of the extraordinary scope and scale of recent industrial reform and given the relatively confined scope of modern awards (and the ability to vary them) compared to the National Employment Standards (**NES**), the Commission should take a restrained approach to award variation in the Work and Care Review and should be restrained in its reliance on the recommendations of the Final Report of the Senate Select Committee on Work and Care (**Senate Report**).

8. To elaborate these positions, this submission responds to the Discussion Paper in 3 parts:
 - a) a brief analysis of the scope and context of the Review and task of the Commission in this Review;
 - b) a brief analysis of existing rights, entitlements and protections for workers with caring responsibilities;
 - c) a response to each of the Discussion Paper questions.

PART B – SCOPE OF THE REVIEW

9. The Discussion Paper addresses ‘Work and Care’ in its broadest sense. It does not address industrial issues arising from the ‘care sector’ (i.e. aged care, disability care, childcare etc) but rather covers the experience of workers who balance care and work responsibilities.
10. A review of the questions arising from the Discussion Paper discloses the extremely broad scope of the Review, seeking suggestions for variations for modern award terms concerning:
 - a) Individual Flexibility Arrangements (**IFAs**);
 - b) WFH arrangements;
 - c) Part-time arrangements;
 - d) Leave entitlements;
 - e) Rostering practices;
 - f) Minimum engagements;
 - g) Overtime;
 - h) TOIL;
 - i) Definitions of immediate family;and more.
11. Two initial observations arise from this.
12. One; at least some of the topics raised (e.g. leave entitlements) are, in ACCI’s submission, more appropriately addressed in the NES and by legislative reform rather than through the award system which has a more limited coverage than the NES. There are both merit and potentially jurisdictional issues which arise from this which will be developed later in this submission.
13. The second observation concerns the Senate Report. As is apparent from the Ministerial Request extracted at [1], the impetus for the ‘Work and Care’ Stream arose from the Senate Report. The Discussion Paper deals with 5 of the 10 items in the Terms of Reference of the Senate Report.

14. The Senate Report contains a range of proposals of considerable breadth. In ACCI's submission, reforms of the scale and type sought by the Senate Report, described as '*a new work and care social contract fit for the 21st century*'³ are unlikely to be appropriate or even possible in the context of a modern awards review.
15. A review of the Senate Report discloses that, aside from strong advocacy for award wage increases in various care sectors⁴ and a proposal to rostering rules under modern awards⁵, the Senate Report largely addresses 'work and care' in a general sense, and from the perspective of the needs of workers rather than proposing specific reform of modern awards. The Senate Report, by way of example, does not reference or consider the Modern Awards Objective. This is not a criticism (there is no requirement for the Committee to consider the Modern Awards Objective), but it does demonstrate that the context of the Senate Report, and the recommendations within it, is very different to the context of an award review by the Commission.
16. Critically, the Senate Report is largely, if not entirely, directed to considering the needs of employees who have caring responsibilities. In ACCI's submission, the Senate Report does not meaningfully engage with the needs of employers or business. This demonstrates the fundamental difference between the purpose of the Senate Report and task of the Commission under the Fair Work Act.
17. Any variation to modern awards needs to appropriately balance the needs of employees and employers.
18. The task of the Commission in this Review is not simply to best facilitate the task of caring in Australian society through amendment of modern awards.
19. Neither is it, via modern awards, to simply implement the recommendations of the Senate Report.
20. The task of the Commission is to create a fair and relevant safety net, having regard to the 'limbs' of the modern awards objective⁶:
 - (a) relative living standards and the needs of the low paid; and

³ See Senate Report Recommendation 1 at [8.11].

⁴ See Senate Report Recommendation 15 at [8.88].

⁵ See Senate Report Recommendation 21 at [8.125].

⁶ See Fair Work Act s 134.

- (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.

21. The precise weighting and assessment of each of the limbs will entirely depend on the proposals put forward by the parties. From ACCI's perspective, it is essential that the Commission has regard to s 134(1)(d) and (f) in considering any proposals.
22. The central limb of importance in the modern awards objective for this stream of the Review appears to be:

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

23. In ACCI's assessment, 'flexible modern work practices' are precisely the arrangements required if workers with caring responsibilities are to seek to 'balance' work with care. 'Flexible modern work practices' cannot be 'one-way' and are not achievable in a context where a modern award applies a rigid framework to employers which cannot be readily adapted to individual circumstances.
24. To the extent that modern awards require variation to facilitate flexibilities to accommodate the caring needs of employees, it is critical that those variations facilitate flexibilities for employers as well.
25. There are a range of examples where the provision of flexibility for employees simply come at a 'cost' to employers. One example addressed in these submissions is the imposition of penalty payments where an employee works unusual working hours from home in order to accommodate their personal circumstances.
26. In the view of ACCI this need not be the case. ACCI does not oppose flexibility in the award system to accommodate individual needs. ACCI actively encourages it.
27. What ACCI opposes is the creation of flexibilities for employees which come at a cost of increased and unnecessary rigidities in the system for employers. As has been developed in other submissions,⁷ ACCI does not seek in these proceedings to reduce worker entitlements – but rather to create more workable and useable procedural mechanisms for varying the operation of Awards to cater to individual needs.

⁷ See ACCI Submissions in 'Making Awards Easier To Use' 22 December 2024 from [1.7] <https://www.fwc.gov.au/documents/sites/award-review-2023-24/am202321-sub-acci-221223.pdf>.

PART C – EXISTING ENTITLEMENTS, RIGHTS AND PROTECTIONS

28. Workers with caring responsibilities under the Fair Work Act have a strong existing framework of entitlements, rights and protections. A ‘right to care’, a phrase used in the Senate Report⁸, already exists.
29. In addition to the long-standing provisions concerning maximum ordinary hours, the ability to refuse unreasonable additional hours, the ability to work part-time or casual, paid annual leave, paid personal/carers leave, parental leave, compassionate leave and general protections against discrimination and adverse action, workers with caring responsibilities have a range of newly established entitlements which are yet to commence or have yet to have full effect.
30. From 6 June 2023, through the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth), workers with caring responsibilities now have a *considerably* more significant right to request flexible work arrangements to accommodate their caring requirements.⁹
31. The circumstances in which employees can make a request were expanded to include where the employee is pregnant, experiencing family and domestic violence, or providing care to a member of their immediate family or household who is experiencing family or domestic violence.¹⁰
32. A new provision (section 65A) has been inserted into the Fair Work Act setting out various obligations for employers when responding to a request, including that the employer can only refuse the request on reasonable business grounds, if it has first genuinely tried to reach agreement with the employee and has had regard to the consequences of refusing the request for the employee.¹¹ The new section 65A was based on the model award term developed by the Commission and inserted into modern awards during the 4 Yearly Review.¹²
33. A new provision (section 65B) was inserted to deal with disputes about flexible working arrangements. Section 65B requires parties to first attempt to resolve the dispute at the workplace level and, where this does not resolve the dispute, allows the dispute to be referred to the Commission.

⁸ See Senate Report Recommendation 1 at [8.11].

⁹ *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) Part 11- Flexible Work.

¹⁰ *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) ss 466–447 and 469A.

¹¹ *Ibid* s 459.

¹² Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* [618].

34. The fact that workers with caring responsibilities can now ‘litigate’ a flexible work refusal in the context of s 65 confers a significant entitlement to such workers, particularly in the context where the threshold for a refusal of a flexible work request remains high.¹³
35. ACCI notes that the full effect of the variation of the s 65 regime is yet to crystallise.¹⁴
36. Further, ACCI notes that the s 65 regime can potentially deal with many of the issues raised in the Discussion Paper, on an individual and tailored basis rather than a ‘one-size fits most’ (i.e. modern award covered employees) result that would emanate from a modern awards review.
37. Even newer than the s 65 regime amendment is the recently passed ‘right to disconnect’¹⁵.
38. As is apparent from its inclusion in the Discussion Paper, the ‘right to disconnect’ has a bearing upon the relevant issues raised in the Discussion Paper, and the effect of its introduction remains to be seen.
39. To that end, further variation of modern awards to address issues which the ‘right to disconnect’ has explicitly been brought in to address seems premature in circumstances where the ‘right’ has yet to commence.
40. Recent reforms relating to the definition of casual employment and ‘employee choice’ may also have a bearing on ‘work and care’ issues.
41. For the above reasons, ACCI notes that in the context of the major industrial reform, the Commission should exercise restraint and caution when considering further ‘award-based’ proposals.

¹³ See s 65A references to the new working arrangements requested being **too costly** for the employer, there being **no capacity** to change the working arrangements of other employees, that it would be **impractical to change the working arrangements of other employees, or recruit new employees**, to accommodate the new working arrangements requested, that the new working arrangements requested would be likely to result in a **significant loss in efficiency or productivity** or that the new working arrangements requested would be likely to have a **significant negative** impact on customer service.

¹⁴ See Discussion Paper at [120]: “Given the recency of the amendments commencing operation, the impact of the new amendments are not yet known”.

¹⁵ See *Fair Work Legislation Amendment (Closing Loopholes No 2) Bill 2024* (Cth).

PART D – ACCI RESPONSE TO SPECIFIC QUESTIONS

(1) **Part-time - 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?**

42. ACCI does not propose any specific variations to part-time provisions in modern awards.

43. In considering any proposals from other parties, ACCI makes the following submissions.

44. As noted in the Discussion Paper, the Commission has previously acknowledged that part-time arrangements are not simply less than full-time arrangements:

award provisions have not been constructed simply to allow any person to be employed on any number of hours below full-time hours.’ Rather, part-time and casual work retains distinctive features that reflect its original purpose to provide flexibility for certain workers, notably those with caring or study commitments.¹⁶

45. Indeed, part-time engagements (and the various NES and award conditions applying to them) exist in part to facilitate care arrangements. As noted in Decision [2017] FWCFB 3541 at [87], part-time employment itself was originally conceived as a limited facility to permit the employment of women with family responsibilities to be employed.

46. With societal recognition that men as well as women had family responsibilities, gender restrictions on access to part-time employment have been removed.

47. On that issue, ACCI acknowledges that caring responsibilities are undertaken disproportionately by women.¹⁷ No doubt in part because of this, part-time employment is also disproportionately undertaken by women.¹⁸

48. ACCI supports measures to better balance the proportion of caring responsibilities undertaken by women and men.

49. Notwithstanding this support, ACCI holds the view that the reasons behind such disparities are complex.

¹⁶ See Discussion Paper at [90].

¹⁷ Females are more likely to be carers than males, with 12.3% of all females providing care and 9.3% of all males - Australian Bureau of Statistics 2018, Disability, Ageing and Carers, Australia: Summary of Findings, viewed 9 March 2024, available: <https://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release#carers>.

¹⁸ WGEA (2022), Wages, ages and gender pay gaps, <https://www.wgea.gov.au/age-and-the-gender-pay-gap>, viewed 7 March 2024.

Indeed, these disparities likely do not arise as a product of the award system, nor are they likely to be 'cured' by variations to modern awards.

50. ACCI holds the strong view that the imposition of further restrictions concerning part-time employment has the potential to undermine the current flexibilities being utilised by workers with caring responsibilities and their employers to accommodate their specific needs. The creation of part-time provisions which are rigid, or which provide 'one-way' flexibility are likely to disincentivise employers from agreeing to (or even being able to accommodate) part-time arrangements.
51. ACCI does not propose any variations to part time clauses and would reject any attempts by other parties to vary awards to make them more unattractive to employers, particularly by introducing further rigidity.

(2) Individual flexibility agreement – 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?

52. ACCI has proposed a variation concerning IFAs in the 'Making Awards Easier to Use' stream of the Review.
53. It is a matter for the Commission in which 'stream' of the Review that claim is ventilated. It appears to ACCI that its claim should properly be dealt with in the 'Making Awards Easier to Use' stream.
54. Given our position with respect to IFAs is fundamental to the issues relevant to 'Work and Care', we restate our position below.
55. IFA clauses serve a critical purpose. Given the diversity of workplaces (and the range of needs and circumstances of workers), the terms of modern awards are not always suitable for every working arrangement. There must be a mechanism for allowing employers and employees to agree to arrangements that differ from the terms of an award. IFAs are designed to provide such a mechanism. They benefit employers and employees who chose to enter into them.
56. Unfortunately, IFAs are rarely used. In the General Manager of the Commission's most recent report into

the use of IFAs pursuant to section 653¹⁹, of all respondents (comprising employers, unions, employer associations and legal practitioners) 64.9% had been involved in the making of or responding to 10 or fewer IFAs between 2018 and 2021.

57. The feedback that ACCI persistently receives from employers and their representatives is that the low utilisation of IFAs is largely attributable to the administrative complexity and burden required by IFA clauses. In particular, it is unclear how the requirement for an employee to be better off overall under an IFA must be satisfied.
58. The lack of 'take-up' of IFAs is particularly relevant to a discussion about 'Work and Care'.
59. Indeed, the illustrative example found in the Explanatory Memorandum to the Fair Work Bill 2009 states as follows:

570. Clause 144 requires a modern award to include a flexibility term. A flexibility term is a term that enables an employee and his or her employer to agree on an individual flexibility arrangement that will vary the operation of the award to meet the genuine needs of the employee and the employer. For example, an individual flexibility arrangement might provide for varied working hours to allow parents or guardians to drop off or pick up children from school where this suited the business needs of the employer.

60. If utilised, IFAs could play a meaningful role in facilitating the balancing of work and care arrangements within the modern awards system.
61. Accordingly, ACCI restates its proposal made in the 'Making Awards Easier to Use' stream of the Review as follows:

The clauses relating to individual flexibility arrangements (IFAs) in each of the Common Awards should be amended to include the following additional clause:

X.5 An agreement must result in the employee being better off overall at the time the agreement is made than if the agreement had not been made.

¹⁹ Murray Furlong, General Manager's report into individual flexibility arrangements under section 653 of the Fair Work Act 2009 (2018-2021) (Report, November 2021) 10.

X.6 For the purposes of clause X.5, an employee would be better off overall if the agreement:

(a) does not disadvantage the employee overall; and

(b) is preferred by the employee in comparison with the relevant award terms because it better meets their genuine needs.

62. As developed in our submissions in the 'Making Awards Easier to Use' Stream of the Review, there are prescriptive requirements imposed on the content of IFA clauses. Section 144 provides:

Requirements for flexibility terms

(4) The flexibility term must:

(a) identify the terms of the modern award the effect of which may be varied by an individual flexibility arrangement; and

(b) require that the employee and the employer genuinely agree to any individual flexibility arrangement; and

(c) require the employer to ensure that any individual flexibility arrangement must result in the employee being better off overall than the employee would have been if no individual flexibility arrangement were agreed to; and

(d) set out how any flexibility arrangement may be terminated by the employee or the employer; and

(e) require the employer to ensure that any individual flexibility arrangement must be in writing and signed:

(i) in all cases--by the employee and the employer; and

(ii) if the employee is under 18--by a parent or guardian of the employee; and

(f) require the employer to ensure that a copy of any individual flexibility arrangement must be given to the employee.

(5) Except as required by subparagraph (4)(e)(ii), the flexibility term must not require that any individual

flexibility arrangement agreed to by an employer and employee under the term must be approved, or consented to, by another person.

63. ACCI's Proposal would not affect the clauses' satisfaction of any of the requirements except paragraph (c).
64. The two questions relevant to Proposal are therefore:
- (1) whether the proposed new subclause is capable of being inserted into the awards; and
 - (2) whether the proposed new subclause should be inserted into the awards.
65. Each of these questions are addressed below.

Satisfaction of Statutory Requirements

66. The Fair Work Act does not define the phrase "better off overall" specifically in relation to IFAs.
67. There is a presumption however that words and phrases are used consistently throughout a statute.²⁰ Although the "better off overall test"²¹ that must be passed by proposed enterprise agreements as a precondition of approval has been subject to significant dispute in the Commission and the courts, the phrase "better off overall" itself does not appear to have been precisely defined. However, the High Court accepted a submission that: the BOOT "requires an overall assessment to be made", which in turn "requires the identification of terms which are more beneficial for an employee, terms which are less beneficial and an overall assessment of whether an employee would be better off under the agreement". What is involved is a comparison between terms and conditions under the agreement and the terms and conditions under the modern award.²²
68. In addition, the High Court held that the better off overall test "may be contrasted with the "no disadvantage" test which was the legislative predecessor of the BOOT".²³
69. We are satisfied that our definition of the phrase "better off overall" is not contrary to the Fair Work Act. At the outset, it should be recognised that the rule that a phrase must have a consistent meaning throughout

²⁰ See *Clyne v Deputy Federal Commissioner of Taxation* (1981) 150 CLR 1.

²¹ *Fair Work Act 2009* (Cth) s 193

²² *ALDI Foods Pty Ltd v Shop, Distributive & Allied Employees Association* (2017) 262 CLR 593, 620 [92].

²³ *Ibid* 620 [93].

a statute is “*only a presumption*”.²⁴ It “*must yield to the requirements of the context*”.²⁵ It is well recognised that a word may be used in two different senses in the same section of the one Act.²⁶

70. That aside, it is not submitted that the phrase “better off overall” possesses a drastically different meaning in each context. Both IFAs and enterprise agreements require the provision of more favourable terms and conditions in comparison with the applicable modern award in an overall sense.
71. However, the new words would clarify that this does not preclude circumstances where, all else being held equal, the IFA can provide more favourable terms and conditions by virtue of being preferred by the employee. This is entirely consistent with the natural and ordinary meaning of the phrase “better off overall”: the preference for or weight attached to the terms of the IFA by the employee is a benefit that can render the agreement more favourable than the award.
72. The words “because it better meets their genuine needs” would reflect the purpose of IFAs. While enterprise agreements are focussed on the general terms and conditions provided to each employee, primarily but not exclusively in a monetary sense, IFAs must be entered “in order to meet the genuine needs of both the employee and the employer” (clause X.1). If the IFA achieves this purpose in a way that is preferable to the employee, but its terms are otherwise equivalent to the relevant modern award, it will nevertheless result in the employee being “better off overall”.
73. This distinction in the approach to whether an IFA vis-à-vis a proposed enterprise agreement leaves an employee “better off overall” is further explained by the nature of the respective agreements. The FWC cannot easily ascertain the preferences for, or weights attached to, various terms and conditions in the proposed enterprise agreement by the employees whom it would cover; the employees’ views are primarily encapsulated in their expression of genuine agreement including through a majority vote. The relevant employees will rarely have identical preferences for, or attach the same weights of benefit to, the terms of the proposed agreement, and in many cases, there will be significant diversity in those preferences even where there is majority or stronger support for the agreement. For example, while some employees may prefer the proposed agreement because of the rolling up of rates that allows them to work

²⁴ *Inland Revenue Commissioners v Littlewoods Mail Order Stores Ltd* [1963] AC 135, 159.

²⁵ *Madras Electric Supply Corp Ltd v Boarland* [1955] AC 667, 685.

²⁶ *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 643 (Gibbs J).

at preferable hours, others may simply prefer the more generous leave entitlements it offers. Moreover, the Commission is bound to consider whether the proposed enterprise agreement leaves “each reasonably foreseeable employee” employee “better off overall”, whose preferences cannot be ascertained by the Commission.²⁷

74. For IFAs, by contrast, its application to an individual employee means that their preferences can be clearly identified. These preferences can therefore be taken into account when considering whether the agreement leaves the employee “better off overall”.
75. Even with this distinction, there are analogous considerations taken into account when assessing whether a proposed enterprise agreement leaves each employee “better off overall”. The Commission is bound to consider any views relating to whether it does so that are expressed by the relevant employees and their bargaining representatives,²⁸ with primary consideration given to common views expressed.²⁹ Clearly, the preferences and value attached to the terms of the proposed agreement are considered when assessing whether it leaves each employee “better off overall”.
76. Consideration of the preferences and needs of the employee is also consistent with the advice of the Fair Work Ombudsman (**FWO**). In their Use of individual flexibility arrangements Best Practice Guide, the FWO notes that:

“When deciding if the employee is better off overall you should consider the following questions:...

- Are there any other circumstances or characteristics unique to the employee that should be considered? (For example, factors such as the employee’s family commitments, their health, whether they have a second job, study or other interests.)³⁰*

77. This question clearly recognises that the employee’s “genuine needs” should be considered when determining whether the IFA leaves the employee “better off overall”.
78. In summary, the proposed new wording would not seek to substitute the “better off overall” test for IFAs with the distinct “no disadvantage test” that formerly applied to enterprise agreements. It would merely

²⁷ Fair Work Act 2009 (Cth) s 193.

²⁸ Ibid s 193A(3)(b)-(c).

²⁹ Ibid s 193A(4).

³⁰ Fair Work Ombudsman, Use of individual flexibility arrangements Best Practice Guide .

recognise the fact that where an IFA is otherwise equivalent in benefit to the award, the preferences of the employee considering their “genuine needs” would successfully render it “better off overall”.

Merits

79. The merits of ACCI’s proposal are relatively simple.
80. IFAs can offer employers and employee significant benefits to productivity and flexibility; however, they are currently underutilised. ACCI’s proposal would, to some degree, provide parties with a clearer understanding of how an IFA could be entered into to obtain these benefits. It would achieve this by assuring parties that even if an IFA does not result in an employee being “better off overall” in a strict monetary or quantifiable sense, if the terms of the IFA are at least equivalent to the modern award, the employee’s preference for the IFA on the basis of their genuine needs would make the IFA mechanism accessible.
81. In that IFAs could be utilised to assist employees to balance work and care responsibilities; an increase in their use will assist a better balance of those responsibilities for affected workers.

Modern Awards Objective

82. ACCI’s Proposal would make IFA clauses more “easy to understand”.³¹ It would do so by clarifying how an employee can be made better off overall under an IFA.
83. By making IFAs more usable and accessible, further benefits to the considerations under the modern awards objective would also arise. Primarily, making IFAs easier to use would “*promote flexible modern work practices*”.³² It would also likely “*promote ... the efficient and productive performance of work*” given the improved ability for businesses to tailor award terms to their genuine needs.³³ Additionally, it would reduce “*the regulatory burden*” involved in being bound to the terms specified in the awards and thereby minimise the detrimental “*impact of any exercise of modern award powers on business*”.³⁴
84. ACCI’s proposal may also address “*the needs of the low paid*”.³⁵ In the absence of these clauses,

³¹ Fair Work Act 2009 (Cth) s 134(1)(g).

³² Ibid s 134(1)(d)

³³ See *ibid*.

³⁴ Ibid s 134(1)(f).

³⁵ Ibid s 134(1)(a).

employers paying workers close to the minimum award rates may be deterred from entering into IFAs because of a misunderstanding that such agreements require the employee to be “better off overall” in a monetary sense, which they may be unable to afford. The new clauses would clarify for such employers that this is not so and thereby provide opportunities for greater flexibility for low paid employees.

85. ACCI’s proposal does not result in a reduction in worker entitlements. Under this proposal IFAs will continue to require the provision of more favourable terms and conditions in comparison with the applicable modern award in an overall sense. Critically, such arrangements will be by *choice* of the employee to accommodate their needs.

(3) Facilitative provisions – 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?

86. ACCI does not have any proposal or specific feedback on this aspect of the Discussion Paper.
87. It is not aware of any member feedback concerning difficulties with the current facilitative provisions arrangements under modern awards.
88. ACCI is open to engaging with any suggestions made by other parties in the context of this review however notes, as developed elsewhere in the body of these submissions, the importance of allowing modern awards to accommodate flexible arrangements which are tailored to specific circumstances rather than a ‘one size fits all’ approach.

(4) Working from home – 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?

89. ACCI has a proposal concerning modern awards as they apply to work from home.
90. As noted by the Discussion Paper, technological advances across a range of industries have made various forms of working from home possible.³⁶ Following this, necessity during the Pandemic accelerated the development and extent of working from home. Many parts of the economy have maintained ‘hybrid’ working arrangements even after the extreme conditions of the Pandemic.

³⁶ See Discussion Paper at [134]

91. As noted by the Discussion Paper, hybrid or remote work can present challenges for employers and employees.³⁷ From the employer perspective, remote work can make it more difficult to facilitate spontaneous collaboration and can give rise to difficulties in supervision and support. Whether ‘hybrid’ work is the appropriate form of work for an employer will likely depend on the specific characteristics of that employer, their industry, their workers, clients or customers and may well change in time (including through changes in the economy). As was developed in *Charles Gregory Gregory v Maxxia Pty Ltd* [2023] FWC 2768 at [45]:
- a) it can be desirable for there to be ‘face to face contact’ within a team;
 - b) face to face presence can allow for observation, interaction and (if necessary) coaching to improve a worker’s productivity and provide them with greater support; and
 - c) ‘face to face’ work means an employee’s knowledge and experience could be more easily accessed by less experienced team members.
92. ACCI does not support the introduction of any general enshrined ‘right to work from home’ in the context of modern awards.
93. Absent any other prevailing obligations or entitlements, the principle of managerial prerogative requires that any decision to allow, facilitate or to direct workers to undertake work from home must ultimately be made by (or at least with the agreement of) employers.
94. From ACCI’s perspective, it is not appropriate to include industry wide ‘rights’ to work from home in modern awards. Such terms can be negotiated through enterprise bargaining or can (as is evident) arise organically at individual workplaces or in certain industries.
95. In the context of ‘work and care’ ACCI notes that existing s 65 flexibility requests can be utilised to seek work from home arrangements. To the extent that WFH is necessary for those with caring responsibilities, those workers have the right to request working from home arrangements under the NES.

³⁷ See Discussion Paper at [134]

ACCI Proposal

96. Notwithstanding the above, the relevant question for this Review is not whether there should exist a 'right' to work from home, but whether modern awards currently facilitate *effective* working from home arrangements.
97. In the context of 'work and care', it is apparent that two types of award provisions place significant restrictions on the benefits that working from home arrangements can create. These are:
- a) span of hours clauses; and
 - b) minimum engagement clauses.
98. **To that end ACCI proposes that, by written agreement between an employer and employee, when working from home, the following award provisions should be able to be varied or not apply:**
- a) **Span of hours clauses; and**
 - b) **Minimum engagement clauses.**
99. ACCI anticipates that the working from home arrangements suitable for this proposal would likely be largely limited to clerical roles, primarily arising under the *Clerks - Private Sector Award*.
100. As a matter of principle however, the concept that span of hours clauses and minimum engagement clauses should **not** impede on working from home flexibilities (where this is agreed by the employee) would apply across all awards.
101. ACCI proposes the above for the following reasons.
102. One, the potential flexibilities and benefits derived from working from home are not limited to simply an avoidance of travel time or employee comfort or convenience.
103. In the context of the 'Work and Care' Review, working from home can allow employees proximity to aspects of their caring responsibilities to allow them to better balance their work and care responsibilities. There are a range of examples of this including:
- a) the ability to cease work for a period, drop off or pick up children, and return to work;

- b) the ability to cease work for a period to provide care/supports such as assistance with dressing, eating or medical assistance for a person in their home (or near their home) and then return to work;
 - c) the ability to be 'available' for any urgent caring need for a person in their home (or near their home) notwithstanding that there is no ongoing direct care requirement.
104. The proposal acknowledges that an employee becomes more personally responsible for determining *when* they work, when they are in the home environment to produce a given output, rather than in the more traditional notion of office hours or business office hours.
105. Where available, the benefits of these flexibilities are obvious.
106. The difficulty that arises in the context of modern awards is that time caring is not time worked (unless the relevant work is in fact caring work, which is a different and separate issue).
107. This means that in order to allow employees to undertake any required caring responsibilities during what would ordinarily be understood as their work hours, employees must 'make up' work time that has been lost when undertaking their caring responsibilities.
108. In the current modern awards system this creates a difficulty where:
- a) the work time to be 'made up' must occur outside a relevant 'span of hours clause'; or
 - b) the work time to be 'made up' would involve a breach of a relevant minimum engagement clause.
109. For the reasons developed in ACCI's IFA proposal, IFAs are currently not an effective solution for these issues.
110. In short and to reiterate, ACCI proposes that where an employee works from home, the employee can **agree** with their employer that the span of hours under an award and the minimum engagement under an award not apply (or otherwise be varied).
111. This will allow employees, where they agree with their employer, to derive the full flexibility benefit of a working from home arrangement and to accommodate, as required, their caring responsibilities.
112. Realistically, ACCI foresees such an arrangement being utilised by employees:

- a) commencing their 'work day' early in the day (potentially in circumstances which would otherwise attract 'early morning' penalty payments) before undertaking required care responsibilities and then returning to 'working from home'. A common example of this would be working before one's children (or other persons requiring care) have woken up or departed for school.
 - b) completing their 'work day' of an evening following a 'work day' interrupted by the completion of caring responsibilities (in circumstances where the evening work may occur outside the relevant span of hours e.g. 7pm in the Clerks Award). A common example of this would be the completion of work tasks after children have 'gone to bed' having otherwise undertaken caring tasks during the afternoon (e.g. school pick-up, sports training, dinner preparation and organising sleeping for children or adults requiring care);
 - c) for reasons of convenience, engaging in work at work for periods less than a relevant minimum engagement period so as to accommodate caring responsibilities. A common example of this might be attendance at work meetings by electronic means from home at times which the worker's caring responsibilities would make it impossible to attend work. For example, in a childcare setting, where work meetings do not occur during the 'working day' due to the requirement to supervise children, a worker who has left site to attend to their personal caring responsibilities (or is simply not rostered that day due to personal caring responsibilities) would be able to electronically attend a team meeting for a short period from home without the payment of a minimum engagement (and the requirement to attend work).
113. ACCI suspects that versions of the above arrangements are likely relatively common already by agreement but are likely operating outside of, rather than in accordance with, the current drafting of modern awards.
114. Any arrangement under such a proposal would be voluntary and subject to employee and employer agreement.
115. ACCI notes that the provisions of 'Schedule I' inserted into the *Clerks - Private Sector Award 2010* during

the height of the Pandemic³⁸ (the **Clerks Pandemic Proceedings**) included the provision for agreed flexibilities in relation to hours worked from home. Those proceedings involved a proposal (in the form of Schedule I) of far greater scope than ACCI's current proposal.

116. Although no application to create an 'ongoing' Schedule I was ever pursued or determined, submissions were filed by employers in those proceedings suggesting the benefits of the flexibilities ACCI now seeks:

The current flexibility in the Clerks Award has been greatly appreciated by employees in particular, as it has provided significant flexibility for managing work commitments with other external obligations including caring responsibilities and other domestic issues.

One example of this is an employer that has a number of part time bookkeepers employed to service their customers. The majority of the employees are women. The employer only requires that the work be done, and their customers' requirements are met as agreed. The employee has the freedom to do the work within their choice of hours of the day and in the blocks of time that suit them – that can be one hour or five hours, or anything in between. The flexibility of start and finish times cannot be underestimated, and the employer has found increased engagement and positive feedback from employees. Additionally, the employer is not looking to have employees come back to an office in the future, as the work is either done at home or at a client site, and the employees are fully supportive of this.³⁹

117. While the circumstances of the Clerks Pandemic Proceedings were exceptional and should not be relied on as a precedent⁴⁰, the experience of working from home and the flexibility benefits which arise for employees when they are allowed to personalise *when* their work is performed apply equally to current conditions.

118. Regarding ACCI's proposal to create an ability for employees and employers to agree that the span of hours or minimum engagement period not apply when working from home, we address the modern

³⁸ [2020] FWCFB 1690.

³⁹ [2021] FWCFB 3653 at [7].

⁴⁰ ACCI further notes for completeness that relevant Schedule I included the notation: The provisions of Schedule I are aimed at preserving the ongoing viability of businesses and preserving jobs during the COVID-19 pandemic and not to set any precedent in relation to award entitlements after its expiry date.

awards objective as follows:

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

119. While workers with caring responsibilities span a range of incomes and demographics, for low paid workers with caring responsibilities, the ability to flexibly manage their work hours from home is consistent with their needs.

120. This limb supports the proposal.

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

121. Regarding this limb, ACCI notes that any flexibility around span of hours or minimum engagement would be entirely voluntary and would be limited to working from home arrangements. ACCI considers this to likely be a neutral consideration.

(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;

122. The relevance of this limb is straightforward. By providing flexible work options while working from home, this will facilitate and assist those with caring responsibilities to fully engage in the economy. Given caring responsibilities are disproportionately undertaken by women⁴¹, this facilitates women's full economic participation.

123. This limb supports the proposal.

(b) the need to encourage collective bargaining;

124. This is of limited relevance.

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

125. The aims of the proposal seek to facilitate and assist those with caring responsibilities to fully engage in the economy and in the workplace. This limb supports the proposal.

⁴¹ See Footnote 19.

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

126. Support under this limb is almost self-evident. The proposal seeks to create a flexible work arrangement which will give rise to efficiencies and productivity not currently possible under the awards system (particularly with respect to the lack of uptake of IFAs).

(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

127. The relevant aspect of this limb to address is the prospect of employees working ‘unsocial, irregular or unpredictable hours’.
128. A range of observations arise.
129. Firstly, the proposal is that employees can **agree** to vary or remove the span of hours clause or minimum engagement clause. This means that, almost by definition, hours that would be worked under such an arrangement are not ‘unsocial’ in the way that such hours might be if an employee was *required* to work them.
130. Secondly, given the proposal is confined to ‘at home’ work, the primary negative aspects of ‘early morning’ or ‘late night’ unsocial work do not arise.
131. Thirdly, ‘the point’ of the proposal is to allow employers and employees to agree on hours that ‘work’ for them and their individual needs. As a merit point, an employee who is required to work into the evening because they have been required to undertake caring responsibilities during the day should not be entitled to penalty payments merely due to the lateness of their work. In reality of course, the prospect of penalty payments applying to such an arrangement means that it is unlikely that an employer would agree to or endorse such an arrangement absent an IFA (the limitations of we discuss above).

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

132. This limb supports the proposal, as granting the proposal would remove regulatory burdens.

133. Perhaps unusually, and as noted above, arguably there would be little cost saving for employers in granting the proposal given employers are unlikely to be paying 'out of span' penalty rates to workers who work atypical hours from home in any event. This is not to say that employers are currently in breach of modern awards in this respect but rather, more likely, that employees are autonomously working at times which suit their personal arrangements (including caring responsibilities) and this is simply an acceptable and sensible modern work practice, and one which should be contemplated by modern awards.

(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

134. ACCI suggests that its proposal for employee and employer agreement to remove or vary span of hours clauses and minimum engagement while working from home would ideally be across modern awards.

135. ACCI suggests this consideration is neutral.

(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.

136. ACCI suggests this consideration is neutral.

(5) A right to disconnect – 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?

137. At the mention of this matter on 21 February 2024, O'Neill DP advised:

In relation to question 5 which is the right to disconnect, it's my intention to not include that in this consultation process in light of the significant developments in the form of legislative change that has taken place.

138. Accordingly, ACCI says no more in relation to this question.

139. ACCI has significant concerns about the potential for future variations to modern awards, with respect to disconnection rights, to severely limit the capacity of employers to get in contact their employees outside of their regular working hours due to the ability of employees to simply refuse to even read, monitor or respond to contact or attempted contact. It will have implications through all workforces.

(6) Minimum payment periods – 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?

140. We refer to our proposal contained in our answer to question 4 above.

141. Developing that proposal with specific reference to minimum payment or engagement periods, we submit as follows.

142. The rationale for minimum engagement periods identified in the Discussion Paper⁴², namely the need to ensure that an 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'* largely does not apply in relation to work from home arrangements.

143. In ACCI's submission, when work is performed 'from home' and it is agreed by an employee and employer, a minimum engagement period should not restrict employees or employers from engaging in work patterns which have mutual benefit.

144. Again, this could take the form of an employee and employer agreeing to the working of a short shift at home and in the ordinary course will be at the convenience of the employee and for their benefit because it suits them.

145. In ACCI's submission, where agreed by an employee and employer, an employee should not be prevented from organising their work and care responsibilities in such a way that would otherwise breach a 'minimum engagement provision'. Equally, there may be forms of work which could readily be performed from home but are prevented from being performed at home due to the imposition of the 'minimum engagement' clause – see for example short online training modules (usually less than 1 hour in duration) which could be completed by employees at their convenience while at home.

146. The central ethos behind ACCI's position and its proposal is that the award system should be flexible

⁴² See references in the Discussion Paper to *4 yearly review of modern awards – Casual employment and part-time employment* [2017] FWCFB 3541 at [399].

enough for employees and employers to come to mutually beneficial arrangements about how work can be performed.

147. In anticipation of further proposals from other parties, the Commission should not proceed with any variation which creates further rigidity in the system as this will likely be counterproductive to both employers and employees requiring flexibility.

148. Attempts to increase minimum engagement or payment clauses by unions will be opposed by ACCI.

(7) Span of hours – 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?

149. We refer to our proposal contained in our answer to question 4 above.

150. Developing that proposal with specific reference to span of hours clauses, we submit as follows.

151. There are obvious potential mutual benefits to both employees and employers in allowing work to be performed at convenient times.

152. For employees with caring responsibilities, the ability to perform work at home during times which would otherwise be considered unsociable hours attracting penalty payments may present an attractive option to balance work and care needs. Again, the ACCI proposal is based on employer and employee agreement and would entirely be confined to working from home.

153. As noted above, ACCI anticipates that some employees may already be engaging in patterns of work which would fit within the framework of its proposal, notwithstanding that the awards system is unlikely to accommodate it in its current form.

154. In terms of proposals by other parties, the Commission should not proceed with any variation which creates further rigidity in the system as this will likely be counterproductive to both employers and employees requiring flexibility.

155. Attempts to reduce relevant spans of hours or create further restrictions in relation to broken shifts will likely be opposed by ACCI.

(8) Notice of rosters – 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?

156. ACCI does not have a specific proposal with respect to notice of rosters.
157. ACCI notes that the Discussion Paper question refers to the Senate Report's recommendation all employees should have at least 2 weeks' notice of their roster except in exceptional circumstances.
158. ACCI does not support a 2 week notice period for roster changes across all awards, as this fails to take into account (amongst other things):
- a) differences between industries in relation to variability in workflow and need for labour;
 - b) the particular circumstances of small businesses or businesses in variable environments for which a two week roster notification requirement would be entirely impractical.
159. ACCI supports the retention of existing provisions and stresses that the Modern Awards Objective requires the balancing of a range of considerations, not simply the accommodation of the new and impossible to define concept of 'roster justice'.
160. ACCI's position is based on the proposition that variability in rostering is a necessary and inevitable result of variability in demand. A fair and relevant safety net cannot simply accommodate an employee's desire for certainty when an employer's needs are not reasonably predictable. Modern awards already contain consultation obligations regarding changes to an employee's regular roster or hours of work and a variety of notice requirements for such changes.
161. ACCI also notes that reforms relating to the definition of casual employment and 'employee choice' in relation to causal conversion are likely to affect access to rostering for eligible employees.
162. Equally, the creation of rigidities in the system in relation to certainties of rosters also has the potential to reduce the ability of employers to provide ad hoc flexibilities to employees, including those with caring responsibilities.
163. ACCI's specific response to any union proposal will obviously depend on any variations proposed.

(9) Availability and guaranteed regular hours – 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?

164. ACCI's response to question 8 is also relevant here.

165. The creation of rigidities in the system in relation to certainties of rosters also has the potential to reduce the ability of employers to provide ad hoc flexibilities to employees, including those with caring responsibilities. ACCI's response to any union proposal will obviously depend on any variations proposed.

166. ACCI also notes that restrictions applied to part-time employment are likely to give rise to an increased impetus to engage casual staff.

(10) Overtime, TOIL, and make-up time – 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?

167. We refer to our proposal contained in our answer to question 4 above.

168. Developing our proposal in relation to overtime, TOIL and make-up time, the potential operation of penalty provisions in modern awards should not provide a restriction on employees and employers engaging in genuinely consensual work arrangements which result in benefits to both employers and employees.

169. Again, our proposal is limited to working from home and is subject to employee and employer agreement.

170. As noted above, IFAs have historically proved an ineffective mechanism for establishing flexibilities in the modern awards system.

171. Although in theory, an employer and employee may consider the use of an IFA to create a work pattern that suits the employee, it is often the potential payment of overtime, TOIL or make up time that creates uncertainty as to whether the employee will be better off overall (and as such whether the IFA will be effective).

172. For clarity, ACCI does not propose as part of this Review to seek to remove or reduce penalty payments or entitlements for employees per se.

173. ACCI's proposal outlined at question 4 above is directed at allowing an employee and employer to agree

to a pattern of work at home that is mutually beneficial (or at least beneficial to the employee) and which does not trigger Award entitlements that would otherwise render the arrangement unworkable.

174. ACCI also notes its TOIL proposal made in the 'Making Awards Easier to Use' stream (see ACCI's [Submission](#) at 3.1).

175. Again, ACCI anticipates that ACCI's TOIL proposal is more efficiently dealt with in that stream but notes, in relation to the context of the 'Work and Care' stream:

- a) an increase in the use of formalised TOIL arrangements is likely to give rise to greater and more useful flexibility for workers with caring responsibilities given TOIL can be used to undertake caring responsibilities as they arise; and
- b) in the context of workers with caring responsibilities, 'time off' may be of greater value than monetary compensation for overtime work.

(11) On-call and recall to duty – 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?

176. ACCI does not have a specific proposal with respect to on-call and recall to duty provisions.

177. ACCI's response to any union proposal will obviously depend on any variations proposed.

178. ACCI notes that these provisions are increasingly dealt with in enterprise agreements, and the individual workplace is the appropriate forum to come to such arrangements and the compensation arising from those arrangements.

179. ACCI further notes that the legislative introduction of the 'right to disconnect' is likely to affect this subject matter and it is entirely premature to consider changes to modern awards in the absence of any data regarding a legislative change introduced to address that precise issue.

(12) Travel time – 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?

180. ACCI does not have a specific proposal with respect to travel time provisions. ACCI's response to any union proposal will obviously depend on any variations proposed.

181. ACCI anticipates that travel time claims will be highly award specific.
- (13) Annual leave – Are there 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?**
182. ACCI does not have a specific proposal with respect to annual leave provisions.
183. ACCI is open to considering the introduction of annual leave at half pay. Any clause giving rise to this entitlement would be significant, as it would effectively ‘double’ an employee’s accrued NES entitlement to take time off work. Any ability to take annual leave at half-pay must be by genuine employee and employer agreement.
184. If this course is pursued, care would need to be taken to separate the ability to agree (or not agree) to take annual leave at half-pay and the existing NES entitlement to annual leave which allows employers to ‘reasonably refuse’ a request to take annual leave (see s 88 of Fair Work Act).
185. In ACCI’s submission, it would not be appropriate to apply a ‘reasonableness standard’ to the ability of an employer to refuse leave at half-pay. Such a decision should be by genuine agreement between the employer and the employee, and the employer (or the employee) should have a genuine choice.
186. While ACCI is open to consideration on this point, it not apparent to ACCI why an NES entitlement would need to be specifically varied for award-covered employees. ACCI submits, as a matter of principle, that entitlements directed at addressing ‘universal’ employee needs are more appropriately addressed within the NES. Modern awards more readily lend themselves to addressing industry specific matters or matters which at least apply more specifically to award-covered workers.
187. The creation of an ‘enhanced’ set of NES standards solely for award covered workers is not conducive to a simple and easy to understand award system, nor does it seem fair.
- (14) Personal/carer’s leave – 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?**
188. ACCI does not have a specific proposal with respect to personal/carers leave provisions.
189. If a proposal is made simply to increase the amount of carers leave for modern award covered

employees, this would be opposed.

190. It is not apparent to ACCI why an NES entitlement would need to be specifically varied for award-covered employees in the context of this Review. As above, ACCI submits, as a matter of principle, that entitlements directed at addressing 'universal' employee needs are more appropriately addressed within the NES.

(15) Definition of immediate family – 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?

191. The scope of this Review obviously does not extend to varying the Fair Work Act.

192. ACCI would oppose a proposal that the definition of 'immediate family' in the Fair Work Act be amended and broadened for the purposes of an employee accessing personal/carer's leave.

193. ACCI understand that the relevant proposal is to broaden the definition of 'immediate family' to include:

1. Any person who is a member of an employee's household and has been for a continuous period of over 18 months.
2. Any of the employee's children (including adopted, step and ex-nuptial children).
3. Any of the employee's siblings (including a sibling of their spouse or de facto partner).
4. Any other person significant to the employee to whom the employee provides regular care.

194. ACCI suggests that such an extension would go beyond the practical and sensible operation of carers leave. Such a definition appears to include housemates and other persons who would not ordinarily be thought of having a sufficient connection to an employee so as to warrant time off work paid for by an employer.

195. In terms of the possible outcomes of this Review, it is not apparent to ACCI that there is a merit basis to specifically vary the operation of this entitlement simply for award-covered employees. It is not apparent that award-covered employees require variation of this definition or that there are any merit grounds to restricting such a change (if it was found to be necessary) to award covered employees.

196. In ACCI's submission, a simple, easy to understand, stable and sustainable modern award system would not involve slight technical variations of category definitions which apply more broadly under the NES. As above, the creation of an 'enhanced' set of NES standards solely for award covered workers is not conducive to a simple and easy to understand award system, nor does it seem fair.

197. Finally, ACCI notes that the Commission will be restricted in what it can consider in relation to any proposed award changes in this context by s 55 of the Fair Work Act. In accordance with s 55, while modern awards may include terms that supplement the NES, it can only do so to the extent that the effect of those terms are not detrimental to an employee in *any respect*.⁴³ The Commission would need to determine whether broadening of the scope of the definition of 'immediate family' could leave employees with less relevant leave for the purposes of their entitlement under the NES i.e. if an employee used their carer's leave to care for their housemate, that employee would be left with less leave to care for their 'immediate family' as that term is defined under the Fair Work Act.

(16) Unpaid carer's leave – 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?

198. In appropriate and agreed circumstances, flexible working arrangements can provide an alternative to extended unpaid carer's leave. Clearly, if an employer could accommodate an employee's caring needs such that they do not need to take unpaid leave - this is something that could be undertaken instead of unpaid leave.

199. Whether this is workable for an individual employer and employee is entirely dependent on the specific circumstances of those parties. To use an example found in the Productivity Commission's report⁴⁴ - the use of 'purchased leave' might present an alternative to the taking of unpaid leave for a particular worker with caring responsibilities.

200. Regardless, this should be a matter for employers and employees to agree and does not appear to

⁴³ See s 55(4) of the Fair Work Act.

⁴⁴ See <https://www.pc.gov.au/inquiries/completed/carers-leave/report/carers-leave.pdf> at 71.

warrant any variation to modern awards.

201. ACCI has no specific variation with respect to unpaid carers leave.

(17) Personal/carer's leave – 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?

202. It is not apparent to ACCI why an NES entitlement would need to be specifically varied for award-covered employees in the context of this Review. ACCI submits, as a matter of principle, that entitlements directed at addressing 'universal' employee needs are more appropriately addressed within the NES.

203. The creation of an 'enhanced' set of NES standards solely for award covered workers is not conducive to a simple and easy to understand award system, nor does it seem fair.

204. Similar to our response to question 15, the Commission will be restricted in what it can consider in relation to any proposed award changes in this context by s 55 of the Fair Work Act. In accordance with s 55, while modern awards may include terms that supplement the NES, it can only do so to the extent that the effect of those terms are not detrimental to an employee in *any respect*.⁴⁵ The Commission would not likely be able simply to 'split' personal leave and carers leave in modern awards.

205. The only likely available course to avoid the effect of s 55(4) would be to simply provide *more* carers leave to Award-covered employees under modern awards than that provided under the NES.

206. This would be unfair, unnecessary and is opposed.

(18) Ceremonial leave – 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?

207. ACCI does not have a specific proposal with respect to ceremonial leave.

(19) Other variations to modern awards? 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?

⁴⁵ See Fair Work Act s 55(4).

208. ACCI does not propose any further variations to modern awards.



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