

By your side



AM2023/21 – Review of Modern Awards 2023 – 2024

Work & Care

ASU Submission

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INTRODUCTION

1. The ASU is one of Australia's largest unions, representing approximately 135,000 members. ASU members work in a wide variety of industries and occupations in the private, public and community sectors. Relevantly` to this Review topic, we are the largest national union in the community and disability sector, the local government sector and the aviation sector. We are also the national union for private sector clerical and administrative workers.
2. This submission is about gender equity. It addresses the problems in our workplace relations system that mean women workers are paid less than men, have fewer opportunities for career progression, and are run ragged by industrial regulation designed to prioritise work over care. This is not to say that men do not also have caring responsibilities, but that the burden of care falls disproportionately on women. We say that if women's work and women's time is properly valued by our industrial relations system, all workers will see the benefits. Every worker should be paid what they are worth, and every person should have the opportunity to care for their friends and loved ones.
3. Our submission is based on three principles:
 - Firstly, workers with caring responsibilities need secure working arrangements to provide a secure income, to give them the certainty to plan their lives, and to provide for time rest, relaxation and social participation.
 - Secondly, workers with caring responsibilities need flexibility to balance work and care. Flexibility is defined by control. Our workplace relations system gives too much power to employers to dictate when and how work is performed. This needs to be rebalanced.
 - Finally, our workplace relations system fails to properly value the work and time of workers in the care and support workforce. Our members in community and disability services need a workplaces relations system that values their work and time. In this space, the word 'care' obscures the complex services provided by our members.
4. The ASU supports the submissions and recommendations of the Australian Council of Trade Unions ('ACTU'). Our submissions are directed to the experiences and interests of our members covered by specific awards.

THE AUSTRALIAN SERVICES UNION

5. The ASU is one of Australia's largest unions, representing approximately 135,000 members. ASU members work in a wide variety of industries and occupations in the private, public and

community sectors. Relevantly, we are the largest national union in the community and disability sector, the local government sector and the aviation sector. We are also the union for private sector clerical and administrative workers.

6. The 'Work & Care' topic in the Modern Awards Review 2023-24 concerns the impact of workplace relations settings on work and care having regard to the findings and recommendations of the Final report of the Senate Select Committee on Work and Care (**'Work & Care Report'**). The ASU participated in the Senate Select Committee's Inquiry and supports the recommendations made in the Senate Report.
7. Of the 25 awards identified in the Discussion Paper, the ASU has a significant interest in the following three (together, 'the Awards'):
 - a. *Clerks - Private Sector Award 2020* (**'Clerks Award'**);
 - b. *Local Government Industry Award 2020* (**'LG Award'**); and
 - c. *Social, Community, Home Care and Disability Services Industry Award 2010* (**'SCHDS Award'**).
8. The *Airline Operations – Ground Staff Award 2020* (**'Airline Operations'**), *Labour Market Assistance Industry Award 2020* (**'Labour Market Award'**), *Contract Call Centres Award 2020* (**'Contract Call Centre Award'**) *Supported Employment Services Award 2020* (**'Supported Employment Award'**) and *the Legal Industry Award 2020* (**'Legal Industry Award'**) also cover a substantial number of women workers who depend on the Award for the terms and conditions of employment. We urge the Commission to consider those Awards in the Review as well.

THE COMMUNITY AND DISABILITY SECTOR

9. The ASU's members working in the community and disability sector (covered Schedules B and C of the SCHDS Award) are essential part of the social services, care and support workforce.
10. Our members provide case work, crisis intervention, referral, financial and other support for individuals of all ages and families experiencing poverty, isolation and homelessness, gambling, drug and alcohol addictions, disabilities, mental health issues, overwhelming legal and financial problems, parents, refugees and migrants. They work with women, children, young people and men who are experiencing or escaping violence and those who are living with physical, intellectual and other disabilities and mental health issues. Our members provide complex, essential services to the most vulnerable people. 'Care' fails to properly describe the work that they do.

11. Our members deserve to be valued for their professional skills and the experience they bring to their communities, with pathways that enable career progression. A key recommendation of the Senate Select Committee on Work and Care in its Interim Report was that an analysis of care work classifications and wage structures be undertaken to recognise the value of care work and to lift wages in the care sectors. The Discussion Paper notes the findings in the Senate Report that low wages and limited career progression opportunities are inextricably linked to and have a detrimental impact on time, and financial and personal resources for unpaid care commitments.¹
12. Schedule B of the SCHDS Award has a broad-banded classification structure that fails to reference modern and sector specific detail or professional skills. The SCHDS Award has been identified as covering priority occupations and industries which may be affected by undervaluation and work value issues, so this issue may be investigated as part of the 2023-2024 Annual Wage Review.² The Commission should note the need for a review of these classifications in the Final report of the Review of Modern Awards.
13. They are predominantly women and must balance their work in the formal care economy with significant caring responsibilities. Many of our members are parents, foster parents, carers for elderly people or people with disability and members of extended kinship networks. They have obligations outside of work that must be valued.
14. The Commission should note in its Final report that the following issues should be considered in future cases:
 - a. Unpaid travel time arrangements,
 - b. the appropriateness of 'sleepover' arrangements under clause 25.7,
 - c. the incidence of unpaid administrative work in caring sectors, and
 - d. the role of funding bodies in future modern award matters.
15. Our members experience many of the problems raised in the Discussion Paper, which we address in the paragraphs below.

¹ Senate Select Committee on Work and Care, *Interim Report*, October 2022, Recommendation 15.

² *Annual Wage Review 2022-23* [2023] FWCFB 3500, [11] and [137]; [180]; [President's Statement](#), *Gender pay equity research – Stage 1 report* (15 November 2023).

SECURE HOURS OF WORK

16. Being a working carer is like keeping multiple plates spinning in the air. Carers must find time to meet the ever-changing demands of work while also fulfilling their caring responsibilities. Secure hours of work are essential for employees with caring responsibilities. Our members tell us that they need predictable incomes to ensure they can pay bills, put food on the table and put a roof over their heads. Unpredictable working hours lead to unpredictable incomes. They tell us they need predictable working hours that work with, rather than against, their caring responsibilities. Secure working hours must be a feature of a fair and relevant modern award safety net for workers with caring responsibilities. But our workplace relations system fails to deliver for working carers.
17. Below we address:
 - a. part-time employment,
 - b. predictable and stable rosters,
 - c. working time protections, and
 - d. consultation about changes to regular rosters.

Part-time Work

18. All part-time employees should have a right to stable and predictable working arrangements, which include consistent working hours, equitable compensation for all work beyond the notified rostered hours, and the opportunity to transition into secure full-time employment.
19. The key terms that should include the following:
 - a. Reasonably predictable hours of work.
 - b. A written agreement outlining a regular work pattern, which should include:
 - i. each day's working hours
 - ii. designated days of expected work,
 - iii. clearly defined starting and finishing times each day,
 - iv. acknowledging that agreed hours do not need to be the same each week.
 - v. with variation in writing being permissible.
 - c. Overtime is paid for all work outside the notified roster.
 - d. The employee will receive, on a pro-rata basis, pay and conditions equivalent to those

of full-time employees who do the same kind of work.

- e. Each Award should include a provision enabling employees to request an update to their contractual work hours after consistently exceeding their contracted hours for six months. This provision should encompass the possibility of transitioning to full-time employment if an employee consistently works full-time hours.³
20. For example, a part-time SCHDS Award employee is not entitled to overtime until they have worked 10 hours in a day or 38 hours in a week (which may be averaged).⁴ The SCHDS Award permits employers to engage staff of contracts with as few as 10 guaranteed weekly hours and vary the employee's working time at will without any additional costs.
21. There is a right in the SCHDS Award to refuse additional hours, but this right is largely difficult to use in practice. The economic power of the employer means part-timers are often too scared to refuse additional hours. Further, many community and disability sector workers have statutory obligations to their clients, participants and consumers. For example, a child protection worker could not finish work until their replacement had arrived on the premises because they are personally responsible for the wellbeing of that child. It is unreasonable to tell a worker who must remain with an employee to ensure their safety and wellbeing that they can simply refuse to continue working.
22. The ultimate outcome of these poor working conditions is that short-hours contracts are common in the community and disability sector. Workers are often forced to hold multiple jobs to make ends meet, particularly in disability services. Better working time protections for part-time employee and portable leave entitlements could improve job security in the community and disability sector.
23. The Commission should consider if weekly minimum engagements are necessary in the SCHDS Award.

Rostering Rules & Shift Changes

24. All employees deserve consistent and reliable rosters regardless of their employer. All employees should be able to rely on published rosters to plan for their lives. Employers should be obliged to genuinely consider employees' perspectives regarding the potential effects of proposed roster changes and genuinely try to accommodate the employees' individual needs. The Award system must be reformed to give employees control over their working hours.

³ See, cl 10.3(g) of SCHDS Award.

⁴ Clause 28.1(b), SCHDS Award.

25. For example, the Airline Operations Award disproportionately favours of employers' unilateral control over working time. Clause 17.2(b) of the Airline Operations Award merely mandates that employers must provide a seven days' notice for a shift worker's shift and allow employers to change an employee's roster with 48 hours' notice without penalty. The only deterrent to making roster changes within the 48-hour window is a 200% penalty rate found in clause 17.2(c).
26. This system results in unpredictable rosters and allows employees little control over their working time. Airline employees often receive less than seven days' notice of their roster and have their rostered shifts changed with little notice. This forces our members to continuously monitor their phones or rostering applications in case their shifts are changed. Further, the absence of enforceable rostering rules exposes employees to variable working hours, fluctuating between minimum and 38 hours per week at ordinary rates. This so-called 'flexibility' places the entire operational burden and risk squarely on the shoulders of employees.
27. Other Awards do not offer any protections for rostering at all. For example, the Clerks Award does not require an employer to give a day worker any notice when setting or changing their roster.⁵ Similarly, an employer has no obligation to give a shift worker any notice of their roster and is only required to give an employee seven days' notice when there are changes to starting and finishing times. This is a significant deficiency for a modern award that covers a significant number of shift workers.

Working Time Protections

28. The modern award system does not value the time of employees working in industries dominated by women. The low standards for working time protections in awards covering woman dominated industries denies many workers overtime payments. This means there is little economic incentive for employers to structure work in a fair and reasonable way.
29. The payment of overtime depends on interactions between ordinary and guaranteed hours, the span of hours, days worked, type of employment and other award provisions. Many ASU awards have unfairly broad spans of hours for day work. For example, the spans of hours in the following awards push day work into the early evening and weekends:
 - a. SCHDS Award (6.00am to 8.30pm, Monday to Sunday),

⁵ Clause 14.

- b. Clerks Award (7.00am to 7.00pm Monday to Friday, 7.00am to 12.30pm Saturday),
 - c. Labour Market Award (6.00 am and 8.00 pm, Monday to Friday); and
 - d. Supported Employment Award (6.00 am and 6.00 pm Monday to Sunday),
 - e. Local Government Award, ordinary hours can be worked with no penalty rate between the following hours:
 - i. Community Services employees (5.00am to 10.00pm, Monday to Sunday)
 - ii. Libraries, (8.00am to 9.00pm, Monday to Sunday),
 - iii. Customer Service (6.00am to 6.00pm, Monday to Sunday).
30. As noted above, in the SCHDS Award, part-time employees are not entitled to overtime until they have worked 10 hours on any day.
31. In the SCHDS Award, employees can be required to sleep at an employer's premises and take responsibility for a vulnerable person under clause 25.7. Workers are only paid an allowance of \$55.89 for this arrangement. While overtime is payable for work performed during a sleepover, workers are often under pressure not to claim time worked during a sleepover.
32. In awards covering traditional male dominated industries, such as manufacturing, employees are paid at ordinary rates when they required to standby for duty.⁶ The Commission should consider if current stand by, sleepover and on call arrangements meet the new gender equity objective of the Fair Work Act.

Consultation

33. Many of the problems experienced by ASU members if the obligation to consult about changes to regular rosters was strengthened. However, the standard consultation term that applies in most modern awards is ineffective. Employers often fail to genuinely consult with their employees about roster changes. Significantly, the current consultation clause mandates that the clause be read in conjunction with any other provisions of this award concerning the scheduling of work or the giving of notice. Arguably, it permits employers to make significant changes to rosters or hours of work without consulting employees in awards with many facilitative provisions or opt-out arrangements.
34. To ensure employees have sufficient time to meaningfully express their concerns about proposed rosters and for employers to consider employees. The standard consultation term

⁶ See for example *Manufacturing and Associated Industries and Occupations Award 2020*, Clause 32.14.

should require the following:

- a. A 14-day notice period for regular roster changes, and
 - b. A provision expressly indicating that consultation over changes to rostering or hours of work is a precondition to change being made.
35. A different approach is possible. A collaborative and consultative approach to rostering and working hours can deliver working arrangements that meet the needs of employers and employees.

CASE STUDY – CONSULTATION IN DISABILITY SERVICES

ASU members engaged as disability support workers with a supported independent living service in the NSW Hunter region contacted the ASU advising they had been notified their commencement times were to be moved back from 7 AM to 6 AM. The staff were given 48 hours to respond to the employer roster change proposal. Many staff at the service could not start at 6am due to carers responsibilities. The staff contacted the ASU for support.

In reviewing the employees' circumstances the ASU was confident that many of the staff would meet the criteria for flexible working arrangement requests in line with the post June 2023 National Employment Standards. However, staff were concerned that dealing with the issue through individual requests may not result the development of a roster best meeting the needs of employees, the employer and the group home clients - including concerns that the changes may seem increase in costs due to the use of agency staff. Union members wanted to work with management collectively to find a reasonable outcome.

An alternate roster was developed through a process of consultation which maintained the 7 AM commencement time and was more workable in enabling staff to meet their carer's responsibilities. The new roster provided better workplace outcomes as less leave was taken up and there were fewer gaps in the roster. As a result of previous group home closures, one employee was now encountering significantly longer travel times. Carer's responsibilities for her young children meant that the employee was unable to commence before 7:30 AM, a specific flexible work arrangement was put in place to meet that employee's needs.

The collectively negotiated roster avoided an exodus of employees from the workplace and was developed with the intention of improving long-term staff retention rates. The case study demonstrates that collective negotiations that also address employee specific carers and other responsibilities can often deliver the best outcomes.

FLEXIBLE WORKING ARRANGEMENTS

36. Flexibility in working arrangements assists carers to balance care responsibilities with paid work, ease time pressures and enable workers to better meet personal and family responsibilities. Our members report that employers impose unnecessarily complex bureaucratic barriers to accessing flexible working arrangements ('FWAs'). Further, many employers require workers to reapply every 12 months, despite the relevant factors outlined in section 65 of the Fair Work Act, such as pregnancy, parental, and caregiving responsibilities, remaining consistent over many years. Members also felt an invasion of privacy due to the unnecessarily detailed information employers require to approve FWAs.

Better Access to Flexible Working Arrangements

37. Awards should be varied to support many more workers to access flexible work and to harmonise FWAs with concepts under anti-discrimination law.
- a. Firstly, employers should have a positive duty to reasonably accommodate flexible working arrangements.
 - b. Secondly, Employers should only be permitted to refuse flexible working requests because of 'unjustifiable hardship'.
 - c. Thirdly, when a flexible working arrangement is in place, it should apply until the employee's circumstances have changed.
 - d. Finally, employees should have the right to revert to their original hours of work when they no longer need a flexible working arrangement.
38. We note that these proposals are consistent with Recommendation 3 of the Interim Report of the Senate Select Committee.

Consultation and Collective Disputes about Flexible Working Arrangements

39. Workplace flexibility is not simply an individual problem. Employees should be able to approach their employer collectively to negotiate policies and procedures dealing with flexible working arrangements. Many employers implement flexible working arrangement policies and procedures without consulting their employees or their representatives. This can cause significant hardship when an employer implements inflexible application processes or unduly strict selection criteria.
40. The consultation terms of modern awards should be varied to ensure that flexible working arrangement policies and procedures are subject to consultation with staff and their

representatives. Additionally, the Fair Work Act should be amended to permit unions to bring collective disputes on behalf of groups of members affected by employer's policy decisions.

CASE STUDY

An ASU member employed as a disability support worker in Western Sydney was notified of alterations to shift arrangements being introduced due to changes in NDIS funding. The workplace is characterised by history of problematic work health and safety conditions associated with supporting complex high needs clients.

The member has parental responsibility for two young children and her elderly parents. Despite the challenging work environment, the member wished to continue working at the group home but was concerned that unless a roster could be arranged meeting her carer's responsibilities, she would not be able to continue in that work.

The employee submitted a flexible work arrangement application in accordance with the Secure Jobs Better Pay amendments to the Fair Work Act 2009. Initially the application was not agreed to by the employer. The ASU then advocated on behalf of the employee both through local discussions and with senior management. As a result of those discussions a roster was successfully built around the employee's availability. Since this initial roster change the employer has introduced further workplace changes.

On each occasion flexible work arrangements have been put in place having regard to the employee's carer's responsibilities. The employee feels supported in her employment and continues to work meeting the needs of complex clients at the group home.

WORKING FROM HOME

41. Working from home is an important flexibility for working carers. Working from home allows employees to take back some of the time and energy lost to commuting and better balance the demands of work with their caring responsibilities and other activities. While not all workers can work from home, there should be a right to request working from home arrangements for those employees who can.
42. The 'right to request' should have the following features:
 - a. The right to request should be open to all employees, not just those who meet the NES criteria to apply for a flexible working arrangements or who have 12 months of service.
 - b. Employers should be obliged to discuss the employee's request with them before responding in writing within 21 days. If the employer refuses the request, they should

be obliged to give reasons.

- c. Employer should only be permitted to refuse a right to request working from home arrangements on reasonable grounds. There should be clear, industry-specific criteria in each award to determine the reasonableness of refusal.
- d. Employees should be able to take disputes to the Fair Work Commission when their requests are refused.
- e. Employees should be able to make requests for working from home arrangements collectively through their union representatives.
- f. Employees should have a clear right to be consulted about working from home policies, processes and procedures.

PAID AND UNPAID LEAVE

- 43. All workers deserve time off work to care for themselves and their loved ones, to rest and relax, and to mourn and grieve when a loved one passes away.
- 44. The current NES leave entitlements are insufficient for employees with caring responsibilities, especially those working in the social services, care and support sectors. A carer is likely to need to take personal leave to carer for loved ones and recover from their own illnesses. 10 days of paid personal leave is insufficient to cover an employee's caring responsibilities and their own personal sick leave.
- 45. Further, many of the ASU's members work closely and intimately other people. They are more likely to get sick than other workers. They are also likely to work with vulnerable people who cannot be exposed to infectious disease. It is likely that workplace policies will require them to take leave at times when other workers would be allowed to return to work. Many of our members use paid annual leave to maintain their income after they have used all their paid personal leave. This means they cannot use that leave for its intended purpose: paid time for rest and relaxation.
- 46. Paid Personal Leave should be broken into separate paid sick leave and carers leave entitlements. Every worker should have 10 days paid sick leave and 10 days paid carers leave. This could be achieved by an award variation supplementing the NES, but this issue may be better addressed through amendments to the Fair Work Act.
- 47. Two days is not enough time to grieve the loss of a loved one. Compassionate leave should be increased to allow every worker enough time to grieve. Many ASU members also have cultural obligations associated with death and grieving that extend beyond the limited grieving period

contemplated by current compassionate leave arrangements. These obligations may include travel to remote and regional parts of Australia or overseas. Compassionate and ceremonial leave arrangements should be reviewed to ensure they are sufficient for all employees.

BREAST FEEDING & WORK

48. Breast feeding is a significant challenge for parents returning to work. Breast-feeding parents will often need to express milk during the working day to ensure that their babies have sufficient supply. This requires short breaks at regular intervals during the day and a hygienic, private space to express milk. ASU members report that they experience significant difficulties accessing time and space for breast feeding activities at work. Members report difficulties negotiating time during working hours to express milk and are often directed to use bathrooms.
49. Employees should have the right to:
 - a. express milk during working hours;
 - b. a private and hygienic space to express milk (not a bathroom); and
 - c. the use of workplace refrigerators to preserve expressed milk.
50. This could be achieved by an award variation or by amendments to the Fair Work Act.
51. Finally, the eligibility criteria for flexible working arrangements should be amended to include breast feeding parents who are not otherwise eligible for a flexible working arrangement.

CASE STUDY

Anne works in a customer service call centre. She works in an office block in a major city. Anne has recently returned from a 6-month period of parental leave. She would have loved more time off, but her family can't afford a year of unpaid leave.

She is still breast feeding her 6-month-old daughter and needs to express breast milk during the day. This helps her maintain her supply and ensures her daughter has breast milk to drink at day care.

Anne needs a private and clean space to express milk. Her employer has refused to make a room available for her use. Instead, she has been told to use the staff toilets during her breaks. Anne can't feed her baby milk that has been expressed in a toilet, it won't be sterile.

SCOPE OF THE REVIEW & CONDUCT OF CONSULTATIONS

52. We note Deputy President O’Neil’s comments about the discussion of ‘concrete proposals’ in the consultation sessions the Mention on 21 February 2023. We respectfully submit that a strict approach to the subject matter of the consultations may unnecessarily limit discussion. Given the consultative, research-driven nature of the review, a more open approach to discussion may be more productive.
53. The Minister did not request an adversarial contest of competing award variations. In the Statement of 15 September 2023, the President noted the key issues raised by the Minister for Employment and Workplace Relations in his letter requesting the review. Relevantly, the Minister described his priority for the Work & Care topic:
- (3) commencing a consultation and research process considering the impact of workplace relations settings on work and care, including early childhood education and care, having regard to relevant findings and recommendations of the Final report of the Senate Select Committee on Work and Care.
54. The President then noted that the outcome of the Review process would be (at [8]):
- Following the conferences, a final report will be issued which will conclude the review process. The report might provide recommendations about possible next steps if parties seek variations to modern awards or propose that the Commission take steps on its own motion to vary awards.
55. It is clear the Review will not lead directly to any variation to modern awards. Indeed, it would be difficult for the Commission to consider the hundreds of possible variations to awards in the time available to deliver its final report. Discussion should not be limited to specific proposals to vary awards. Instead, the parties should be given the opportunity to discuss the significant issues raised by the Commission’s discussion paper. This may generate better ideas for the Commission’s report than the traditional, adversarial approach of industrial arbitration.
56. Consultations should be structured to foster discussion. This may require some departure from the traditional procedures of the Commission.

AUSTRALIAN SERVICES UNION

12 March 2024