

Modern Awards Review 2023-24 (AM2023/21)

Submission cover sheet

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Modern Award Review Stream:

- Arts and Culture:
- Job Security:
- Work and Care:
- Usability of awards:

**WORK AND CARE
MODERN AWARDS
REVIEW 2023–24
Response to Discussion
Paper**

12 March 2024

NSW BUSINESS CHAMBER AND AUSTRALIAN BUSINESS INDUSTRIAL

The New South Wales Business Chamber Ltd (**BNSW**) is New South Wales' peak business organisation with nearly 100,000 members, spanning most industry sectors and sizes. BNSW is a registered state industrial organisation under the *Industrial Relations Act 1996 (NSW)*, as well as a recognised organisation under the *Fair Work (Registered Organisations) Act 2009 (Cth)*.

Australia Business Industrial (**ABI**) is the industrial relations affiliate of BNSW. ABI is federally registered under the *Fair Work (Registered Organisations) Act 2009 (Cth)* and engages in policy advocacy on behalf of its membership as well as engaging in industrial advocacy in State tribunals and the Federal tribunal.

Background

1. In a statement issued on 15 September 2023, the President of the Fair Work Commission (**Commission**) 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**).¹
2. On 29 January 2024, the Commission published a Discussion Paper: Work and Care ([Discussion Paper](#)) as part of the Review.
3. The Discussion Paper contains 19 questions and Parties have been invited to lodge submissions in response to the Discussion Paper by 12 March 2024.
4. The following submission responds to the discussion paper and is filed on behalf of BNSW and ABI (**BNSW/ABI**).
5. These submissions have been prepared having regard to ACCI's contemporaneous submissions and the position between ACCI and BNSW/ABI is a common one.
BNSW/ABI supports ACCI's submissions.

BNSW/ABI's Position

6. BNSW/ABI has one substantive proposal in the 'Work and Care' stream of the Review.
7. BNSW/ABI proposes that, where an employee works from home, by written agreement between the employer and the employee, the following award provisions can be varied or not apply:
 - a) Span of hours clauses; and
 - b) Minimum engagement clauses.
8. The rationale behind BNSW/ABI's proposal can be summarised in 7 points:
 - a) The modern award system and the 'framework' of modern awards has been designed to accommodate work which is performed 'at site' or 'in the office'.

¹ President's Statement, Fair Work Commission, 15 September 2023.

- b) 'Working from home' presents a distinctive and perhaps unique context and opportunity for employers and employees to come to genuinely flexible arrangements about how (and critically *when*) work is performed.
 - c) The ability to work flexible hours provides employees with caring responsibilities with an invaluable tool to help balance their work and care responsibilities.
 - d) Individual Flexibility Agreements are rarely used and are not proving to be an effective means of creating flexible work arrangements in the workplace.
 - e) 'Span of hours' clauses and 'minimum engagement' clauses inappropriately restrict employees and employers from agreeing to working arrangements from home that genuinely work for them.
 - f) A fair and relevant safety net would allow employers and employees to agree to work arrangements where the employee works at times convenient to them, without the restrictions (or potential penalties) of the 'one size fits all' minimum engagement and span of hours clauses included in a modern award.
 - g) BNSW/ABI 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 however the principle of facilitating genuinely flexible working from home arrangements applies across all awards.
9. BNSW/ABI's broader position in this review, consistent with the ACCI submission, is that the modern awards objective requires the creation of a fair and relevant minimum safety net for **both** employers and employees.
10. 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.
11. 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. This must necessarily involve creating flexibility for employers as well.

12. 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.

13. BNSW/ABI endorse and adopt ACCI's submissions regarding:

- a) the task of the Commission in this Review; and
- b) the existing framework of protections and entitlements for carers under the *Fair Work Act 2009* (Cth).

14. BNSW/ABI's responses to each of the specific questions in the Discussion Paper are below.

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?

15. BNSW/ABI does not propose any specific variations to part-time provisions in modern awards.

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?

16. BNSW/ABI does not propose any specific variations to IFAs provisions in modern awards as part of this stream of the Review.

17. Notwithstanding this, BNSW/ABI note that IFAs are rarely used. In the General Manager of the Commission's most recent report into the use of IFAs pursuant to section 653², of

² 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.

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.

18. As developed by ACCI in its submission, the low utilisation of IFAs is attributable to the administrative complexity arising from IFA clauses. In particular, it is unclear how the requirement for an employee to be 'better off overall' under an IFA must be satisfied, particularly where an arrangement may involve the imposition of 'penalty rates'.
19. By way of relevant example, where an employee wishes (for their own convenience) to work during a period which would give rise to 'overtime' or 'out of span' penalty rates, employers find it difficult establish that the employee would be 'better off overall' working their preferred arrangements *without* the payment of the relevant penalty rates.
20. The lack of 'take-up' of IFAs is particularly relevant to a discussion about 'Work and Care'.
21. This 'gap' in the current award system can be remedied at least in part by BNSW/ABI's proposal contained in its answer to Question 4 below.

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?

22. BNSW/ABI does not propose any specific variations to facilitative provisions in modern awards as part of this stream of the review.

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?

23. BNSW/ABI has a proposal concerning modern awards as they apply to work from home. This proposal is also made by ACCI.
24. 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.

25. To that end BNSW/ABI propose 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.

26. BNSW/ABI 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.

27. 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.

28. BNSW/ABI proposes the above for the following reasons.

29. 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.

30. 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 or people in care, 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.

31. 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.
32. Where available, the benefits of these flexibilities are obvious.
33. 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, a different and separate issue).
34. 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 often must 'make up' work time that has been lost when undertaking their caring responsibilities (assuming they wish to retain those work hours).
35. 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.
36. For the reasons developed above and in ACCI's submission, IFAs are currently not an effective solution for these issues.
37. In short and to reiterate, BNSW/ABI 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).
38. 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.

39. Realistically, BNSW/ABI 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 or their daily activities;
- 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 or other persons in care have 'gone to bed' having otherwise undertaken caring tasks of an afternoon (e.g. pick-ups, sports training, medical appointments, dinner preparation etc).
- 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).

40. BNSW/ABI suspect 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.

41. Any arrangement under such a proposal would be voluntary and subject to employee and employer agreement.
42. BNSW/ABI notes that the provisions of 'Schedule I' inserted into the Clerks - Private Sector Award 2010 during the height of the Pandemic³ (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 BNSW/ABI's current proposal.
43. 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 BNSW/ABI 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

³ [2020] FWCFB 1690

*client site, and the employees are fully supportive of this.*⁴

44. While the circumstances of the Clerks Pandemic Proceedings were exceptional and should not be relied on as a precedent⁵, 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.

45. Regarding BNSW/ABI'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 awards objective as follows:

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

46. 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.

47. This limb supports the proposal.

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

48. Regarding this limb, BNSW/ABI note that any flexibility around span of hours or minimum engagement would be entirely voluntary and would be limited to working from home arrangements. BNSW/ABI considers this is likely 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;

⁴ [2021] FWCFB 3653 at [7]

⁵ BNSW/ABI 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.*

49. 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 women, this facilitates women's full economic participation.

50. This limb supports the proposal.

(b) the need to encourage collective bargaining;

51. This is of limited relevance.

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

52. 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.

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

53. 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

54. The relevant aspect of this limb to address is the prospect of employees working 'unsocial, irregular or unpredictable hours'.

55. A range of observations arise.

56. 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.

57. 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.

58. 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 which ACCI deals with in its submission).

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

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

60. 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 currently paying 'out of span' penalty rates to workers who work atypical hours from home by choice nor engaging employees for periods less than relevant minimum engagement periods. 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 accepted work practice which in our submission 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

61. BNSW/ABI 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.

62. BNSW/ABI 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.

63. BNSW/ABI suggest 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?

64. 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.

65. BNSW/ABI says no more in relation to this question.

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?

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

67. Developing that proposal with specific reference to minimum payment or engagement periods:

68. The rationale for minimum engagement periods identified in the Discussion Paper⁶, 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.
69. In BNSW/ABI'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.
70. 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.
71. In BNSW/ABI'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 for the imposition of '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.
72. The ethos behind BNSW/ABI's position and its proposal is that the award system should be flexible enough for employees and employers to come to mutually beneficial arrangements about how work can be performed.

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?

⁶ See references in the Discussion paper to *4 yearly review of modern awards – Casual employment and part-time employment* [2017] FWCFB 3541 at [399]

73. We refer to our proposal contained in our answer to question 4 above.
74. Developing that proposal with specific reference to span of hours clauses, we submit as follows.
75. There are obvious potential mutual benefits to both employees and employers in allowing work to be performed at convenient times.
76. 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.
77. Again, the BNSW/ABI proposal is based on employer and employee agreement and would entirely be confined to working from home.
78. As noted above, BNSW/ABI 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.
79. 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.
80. Attempts to reduce relevant spans of hours or create further restrictions in relation to broken shifts will likely be opposed by BNSW/ABI.

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?

81. BNSW/ABI does not have a specific proposal with respect to Notice of Rosters.
82. BNSW/ABI 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.

83. BNSW/ABI 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'.

84. BNSW/ABI'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.

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?

85. BNSW/ABI does not have a specific proposal with respect to availability and guaranteed hours.

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?

BNSW/ABI does not have a specific proposal with respect to overtime and TOIL.

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?

86. BNSW/ABI does not have a specific proposal with respect to On-call and recall to duty provisions.

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?

87. BNSW/ABI does not have a specific proposal with respect to travel time provisions.

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?

88. BNSW/ABI does not have a specific proposal with respect to Annual leave provisions.

89. BNSW/ABI 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 appear to 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.

90. 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).

91. In BNSW/ABI'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.

92. While BNSW/ABI is open to consideration on this point, it not apparent to BNSW/ABI why an NES entitlement would need to be specifically varied for award-covered employees. BNSW/ABI 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.

93. 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?

94. BNSW/ABI does not have a specific proposal with respect to personal/carers leave provisions.
95. If a proposal is made simply to increase the amount of carers leave for modern award covered employees, this would be opposed.
96. It is not apparent to BNSW/ABI why an NES entitlement would need to be specifically varied for award-covered employees in the context of this Review. As above, BNSW/ABI 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?

97. The scope of this Review obviously does not extend to varying the Fair Work Act.
98. BNSW/ABI 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.
99. BNSW/ABI 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.

100. BNSW/ABI suggests that such an extension would go beyond the practical and sensible operation of carers leave.
101. 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.
102. In terms of the possible outcomes of this Review, it is not apparent to BNSW/ABI that there is a merit basis to specifically vary the operation of this entitlement simply for award-covered employees.
103. It is not apparent that award-covered employees require variation of this definition or that there is any merit grounds to restricting such a change (if it was found to be necessary) to award covered employees.
104. In BNSW/ABI'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.
105. Finally BNSW/ABI 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*.⁷ 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

⁷ See s 55(4) of the Fair Work Act

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?

106. 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.

107. 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 report⁸ - the use of 'purchased leave' might present an alternative to the taking of unpaid leave for a particular worker with caring responsibilities.

108. Regardless, this should be a matter for employers and employees to agree and does not appear to warrant any variation to modern awards.

109. BNSW/ABI 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?

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

111. 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.

112. Similar to our response to question 15, the Commission will be restricted in what it

⁸ See <https://www.pc.gov.au/inquiries/completed/carer-leave/report/carer-leave.pdf> at 71

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*.⁹ The Commission would not likely be able simply to 'split' personal leave and carers leave in modern awards.

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?

113. BNSW/ABI 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?

114. BNSW/ABI does not propose any further variations to modern awards.

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⁹ See s 55(4) of the Fair Work Act