

Modern Awards Review 2023-24 (AM2023/21)

Submission cover sheet

Name

(Please provide the name of the person lodging the submission)

Stuart Maxwell, Senior National Industrial Officer

Organisation

(If this submission is completed on behalf of an organisation or group of individuals, please provide details)

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Modern Award Review Stream:

Arts and Culture:

Job Security:

Work and Care:

Usability of awards:

CFMEU

CONSTRUCTION

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective
s.576(2)(aa)—Promoting cooperative and productive workplace relations and preventing disputes

**Modern Awards Review 2023-24 – Job Security
(AM2023/21)**

**REPLY SUBMISSION OF THE CONSTRUCTION, FORESTRY AND
MARITIME EMPLOYEES UNION (CONSTRUCTION & GENERAL DIVISION)**

21st February 2024

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Introduction

1. On 12th September 2023, the Minister for Employment and Workplace Relations wrote to Justice Hatcher, the President of the Fair Work Commission (the **Commission**), regarding the Government's interest in the Commission initiating a targeted review of modern awards.¹
2. After considering the contents of the Minister's letter, the President determined to initiate an award review (the **Review**) on the Commission's own motion to consider the following matters:
 - whether the terms of modern awards appropriately reflect the new object of the Fair Work Act (FW Act) and modern awards objective regarding job security and the need to improve access to secure work across the economy (the *Job Security* issue);
 - 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 (the *Work and Care* issue);
 - existing award coverage and minimum standards for the arts and culture sector, including potential coverage gaps (the *Arts and Culture* issue); and
 - what parties believe could be done to make awards easier to use (the *Making Awards Easier to Use* issue).²
3. The President's Statement confirmed that the review would be conducted by a five-member Full Bench of the Commission and that the conduct of the review would involve the following steps:
 - The Commission issuing discussion/research papers addressing each of the issues.
 - Following the publication of the discussion/research papers, interested parties would be invited to lodge submissions. There will also be an opportunity to lodge submissions in reply.
 - The Commission would then convene conferences to discuss the issues raised in the discussion/research papers and submissions. In accordance with the Commission's normal practice for award-related matters, the conferences would be open to any interested parties and the conference transcripts would be published on the Commission's website.

¹ President's Statement, 15th September 2023, at paragraph [1]

² *Ibid.*, at paragraph [3]

- Following the conferences, a final report would be issued to 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.³
4. On the 18th December 2023, Deputy President Gostencnik and Commissioner Tran issued a Statement on the next steps for the consideration of the job security issues⁴, and the Commission published a discussion paper concerning job security⁵.
 5. In the December 2023 Statement the Commission invited interested parties to file submissions in response to the discussion paper by 12pm (AEDT) Monday, 5th February 2024 and foreshadowed a mention to finalise arrangements for the consultation process on 6th February 2024.
 6. On 7th February 2024 the Commission issued a further Statement ([2024] FWC 334), which amended the timetable for consultation, and which invited parties to file any submissions in reply by 12pm (AEDT) on Wednesday 21st February 2024.
 7. The CFMEU (Construction & General Division) (the **CFMEU C&G**) did not file an initial submission in response to the discussion paper as we were generally supportive of the submission made by the ACTU. We do however make this brief reply submission in response to the submissions filed by the employer parties that concern awards in which we have an interest.

The NSW Business Chamber (BNSW) and Australian Business Industrial (ABI) Submission

8. The BNSW/ABI submission is largely taken up by setting out their preliminary views as to how modern awards currently address the new provisions in s.3(a) and s.134(1)(aa) of the FW Act. The CFMEU C&G notes that the Commission, at the mention held on 6th February 2024, indicated that these matters would not be considered in the different issues/streams process but would be a matter for consideration by the Full Bench.⁶ We therefore do not intend to reply to those particular submissions now, but reserve our right to respond at the appropriate time set by the Full Bench.
9. The only part of the BNSW/ABI submission that we wish to make comment on is Part IV – Response to the Discussion Questions. We make no comment on their response to questions 1

³ Ibid., paragraph 8.

⁴ [2023] FWC 3373

⁵ <https://www.fwc.gov.au/documents/sites/award-review-2023-24/am202321-discussion-paper-job-security-181223.pdf>

⁶ See transcript of mention on 6th February 2024

to 3 as we have no significant interest in the seven most commonly used awards identified in paragraph [13] of the discussion paper.

10. In their response to questions 4 and 5, BNSW/ABI make the illogical statement that without “*casual work or some form of it (labour hire)*” employers would “*systematically employ and terminate certain classes of employee which is antithetical to secure work*”.⁷ But this is exactly what employers already do with casual and labour hire workers, who have no security of employment. Casual and labour hire employment is not “*ongoing, stable and secure employment that provides regular and predictable access to beneficial wages and conditions of employment*” which is what the new object of promoting job security is all about.⁸
11. In paragraph 227 of their submission the BNSW/ABI rehash, albeit in a revised way, their tired old suggestion for a flexible part-time employment category which is nothing more than a blatant attempt to allow employers to require part-time employees to work additional hours over and above their mutually agreed hours, but without the payment of overtime penalty rates.⁹ This proposal would be a reduction in conditions and detrimental for employees covered by the *Building and Construction General On-site Award 2020*, *Joinery and Building Trades Award 2020*, *Manufacturing and Associated Industries and Occupations Award 2020* and the *Mobile Crane Hiring Award 2020*, and do nothing to improve job security.
12. In response to question 6 from the discussion paper the BNSW/ABI defend the use of individual flexibility agreements (IFA’s) on the basis that they “*address the need to promote flexible modern work practices, and provide access to flexibility for employees to balance their personal circumstances with work responsibilities, without affecting the security of work*”.¹⁰ They further argue that the absence of an IFA mechanism would have “*a deleterious effect on access to secure work across the economy*”.¹¹
13. The CFMEU C&G strongly disagrees with these statements and notes that the BNSW/ABI provides no evidence to back up its assertions. The CFMEU C&G further notes that the ACTU submission¹² addresses the issue of IFA’s undermining job security¹³ and makes a recommendation that “*the Commission note in its report the ACTU view that individual flexibility arrangements have been inconsistent with the new modern award objective and*

⁷ BNSW/ABI submission at paragraph 219.

⁸ Discussion paper at paragraph [18]

⁹ The BNSW/ABI sought a similar provision in its 2014 application for the insertion of a micro-business schedule in awards, see AM2014/306, which was ultimately withdrawn.

¹⁰ BNSW/ABI submission at paragraph 230.

¹¹ Ibid., paragraph 231.

¹² <https://www.fwc.gov.au/documents/sites/award-review-2023-24/am202321-sub-actu-050224.pdf>

¹³ Ibid., paragraphs 25-29

should not be required or permitted in modern awards.” The CFMEU C&G supports those submissions and the recommendation.

ACCI Submission

14. The ACCI submission follows a similar path to that of the BNSW/ABI and initially deals with what they consider to be the guiding principles for the conduct of this stream of the Review and the scope of the Review. As these matters are more properly dealt with by the Full Bench the CFMEU C&G does not intend to respond to them now but would do so at the appropriate time as determined by the Full Bench.
15. Save for a reference to ACCI proposed changes to the IFA clause, made in their submission to the Making Awards Easier to Use stream,¹⁴ the ACCI do not propose any other changes to modern awards. The CFMEU C&G has already stated its position on IFA’s (see paragraph 13 above) and has nothing more to add.
16. The ACCI submission, in responding to question 4, seeks to rely on a survey of employers by ACCI. The CFMEU C&G submits that this survey serves no useful purpose for the following reasons:
 - There is no indication of the number of businesses that were sent/made aware of the survey. According to the ACCI there were only 119 respondent businesses to the survey which, given the AACI’s claimed representation of a “400,000 strong member network”,¹⁵ is hardly statistically relevant.
 - There is no indication of whether the respondent businesses had an enterprise agreement or were award reliant.
 - There is no indication of what industry the respondent businesses operate in or what modern award was relevant to the employer’s business.

Australian Industry Group (AIG) Submission

17. Like the other employer organisations, the AIG canvasses several additional issues ranging from the legislative framework to legislative reforms before turning their attention to the discussion paper questions. Consistent with our earlier approach the CFMEU C&G will not be responding to those additional issues in this submission but will respond to them when directions are issued by the Full Bench.

¹⁴ ACCI submission at paragraphs 66-71

¹⁵ <https://www.australianchamber.com.au/news/business-backs-4-per-cent-wage-increase/>

18. Whilst we have no real interest in employer responses to questions 1 to 3, we cannot allow the diatribe espoused by the AIG at paragraph 114 of their submission to go unchallenged. This ideological rhetoric that “*the awards system is unduly complex, prescriptive and restrictive*” and that awards “*do not reflect contemporary work practices*” is an employer mantra straight out of the HR Nicholls Society songbook. One can only wonder what the AIG means by “*contemporary work practices*” although we suggest they may be leaning towards an unregulated system where all the power resides with the employer, and workers have little or no protections. Suffice it to say the CFMEU C&G disagrees with the AIG characterisation of awards and the award system.
19. The AIG’s assertion in paragraph 130 that the “Standard Part-time Model” is prohibitive and prevents employers being able to engage employees on a part-time basis is made without any supporting evidence, and the suggestion that it is axiomatic that as a result “*employers prefer other more flexible forms of engagement such as casual employment, labour hire workers and independent contractors*” doesn’t stand up to scrutiny. Employers use of these “*flexible forms of engagement*” has nothing to do with modern award part-time provisions. Employers use them so that they can hire and fire at will without any ongoing commitment to the employment of workers and little chance of a dismissal being challenged.
20. In regard to the proposal set out in paragraph 131 (that consideration be given to potential changes to awards dealing with greater flexibility as to how ordinary hours of work may be arranged, revising rostering provisions, and removing barriers to the engagement of employees on a part-time basis), this is nothing more than an attempt by the AIG to re-agitate matters that were considered in great detail in the 4-Yearly Review of modern Awards. The attempt by the AIG to re-agitate these issues under the guise of improving job security is nothing more than a ruse which is strongly opposed by the CFMEU C&G.

Housing Industry Association (HIA) Submission

21. The HIA filed a brief submission in which they make some general observations about casual employment in the residential building industry. The CFMEU C&G disagrees with the HIA’s claim that “*casual employment is a beneficial and viable form of employment from both the perspective of the employer and employee*”.¹⁶ From our experience casual employment is not beneficial to employees, particularly in an industry that has daily hire employment with leave entitlements but termination on a days’ notice. The reality is that only providing employment on a casual basis has become a business model for many employers in the industry, particularly

¹⁶ HIA submission, p.1

labour hire companies, aided by legislative changes introduced by the previous Liberal/National government. Casual employment provides no job security for workers.

22. The HIA also suggest that “*Generally, the rights and entitlements of casual employees should be determined by the Act as opposed to the Modern Awards.*”¹⁷ The CFMEU C&G disagrees as historically the entitlements of casual employees, in regard to loadings, penalty rates, allowances, ordinary hours and minimum periods of engagement, have been determined by the awards taking into account the requirements and nature of the industry covered by the award. This arrangement should continue.
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¹⁷ Ibid., p.2