

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

*Health Professionals and Support
Services Award 2010 and
Nurses Award 2010
(AM2016/31)*

14 March 2017



4 YEARLY REVIEW OF MODERN AWARDS

AM2016/31 HEALTH PROFESSIONALS AND SUPPORT SERVICES AWARD 2010 AND NURSES AWARD 2010

1. INTRODUCTION

1. This submission is filed in support of the substantive claims sought by the Australian Industry Group (**Ai Group**) in relation to the 4 yearly review (**Review**) of the *Health Professionals and Support Services Award 2010* (**Health Professionals Award**) and *Nurses Award 2010* (**Nurses Award**) in accordance with the directions issued by Vice President Catanzariti on 23 November 2016.
2. Ai Group is proposing the inclusion of a facilitative provision in clause 27.1 of the Health Professionals Award and clause 27.1 of the Nurses Award to enable the 5 hour maximum period before an unpaid meal break is taken to be extended to 6 hours by agreement between the employer and an individual employee or by agreement with the majority of employees.
3. We note that Ai Group is also seeking the insertion of an annualised salary provision in the Health Professionals Award. However, this claim has been referred to a separate Full Bench (AM2016/13 Annualised Salaries) and is therefore not dealt with in this submission.

2. THE STATUTORY FRAMEWORK AND THE COMMISSION'S GENERAL APPROACH TO THE REVIEW

4. Ai Group's proposed variations are being pursued in the context of the Review which is being conducted by the Fair Work Commission (**Commission**) pursuant to s.156 of the *Fair Work Act 2009* (**FW Act**).
5. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).

6. The modern awards objective is set out at s.134(1) of the FW Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (**NES**), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at ss.134(1)(a) – (h).
7. The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the Act, which includes s.156.
8. We later address each element of the modern awards objective with reference to our proposed variations for the purposes of establishing that, having regard to s.138 of the FW Act, the claims should be granted.
9. At the commencement of the Review, a Full Bench dealt with various preliminary issues. The Commission's *Preliminary Jurisdictional Issues Decision*¹ provides the framework within which the Review is to proceed.
10. The Full Bench emphasised the need for a party to mount a merit based case in support of its claim noting however that the extent of argument will depend on the circumstances: (emphasis added):

[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.²

11. In addressing the modern awards objective, the Commission recognised that each of the matters identified at ss.134(1)(a) – (h) are to be treated "as a matter of significance" and that "no particular primacy is attached to any of the s.134 considerations". The Commission identified its task as needing to

¹ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788.

² Ibid at [23]

“balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net”: (emphasis added)

[36] ... Relevantly, s.138 provides that such terms only be included in a modern award ‘to the extent necessary to achieve the modern awards objective’. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms ‘necessary to achieve the modern awards objective’. What is ‘necessary’ in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.³

12. Ai Group’s proposed variations align with the principles in the *Preliminary Jurisdictional Issues Decision* and accordingly should be granted.

3. THE PROPOSED VARIATIONS

3.1 The Health Professionals Award

13. Clause 27.1 of the Health Professionals Award deals with meal breaks. The clause currently provides as follows:

27.1 Meal breaks

- (a) An employee who works in excess of five hours will be entitled to an unpaid meal break of not less than 30 minutes and not more than 60 minutes.
- (b) The time of taking the meal break may be varied by agreement between the employer and employee.

14. Whilst clause 27.1(a) permits some flexibility as to when the meal break may be taken (i.e. at any time before or after the passage of five hours), the Health Award does not provide any ability to vary the number of hours that must be worked by an employee to trigger an entitlement to a meal break. In this regard, clause 27.1 of the Health Professionals Award is unduly inflexible. It is also does not align with the meal breaks clauses in many other awards which contain such flexibility.

³ Ibid at [36]

15. For these reasons, as set out in our [draft determination](#) of 10 August 2016, Ai Group the insertion of the following new clause 27.1(c):
- (c) An employee who works not more than six hours may elect to forgo the meal break, with the consent of the employer.
16. The proposed variation would, in effect, enable an employee to work a shift of six hours or less, without taking a break, subject to the employer's agreement. It would therefore give both employers and employees greater flexibility in arranging breaks.
17. It is our understanding that the variation proposed is not opposed by any interested party to these proceedings.

3.2 The Nurses Award

18. Clause 27.1 of the Nurses Award deals with meal breaks and is in relevantly similar terms to the provision replicated above in the Health Professionals Award. The clause currently provides as follows:

27.1 Meal breaks

- (a) An employee who works in excess of five hours will be entitled to an unpaid meal break of not less than 30 minutes and not more than 60 minutes.
- (b) Where an employee is required to remain available or on duty during a meal break, the employee will be paid overtime for all time worked until the meal break is taken.
19. Whilst clause 27.1(a) permits some flexibility as to when the meal break may be taken (i.e. at any time before or after the passage of five hours), the Nurses Award does not provide any ability to vary the number of hours that must be worked by an employee to trigger an entitlement to a meal break. In this regard, clause 27.1 of the Nurses Award is unduly inflexible. It is also not aligned with the meal breaks clauses in many other awards which contain such flexibility.

20. For these reasons Ai Group seeks the following amendment to clause 27.1(a):
- (a) An employee who works in excess of five hours will be entitled to an unpaid meal break of not less than 30 minutes and not more than 60 minutes. Provided that, an employee who works not more than six hours may elect to forgo the meal break, with the consent of the employer.
21. The proposed variation would, in effect, enable an employee to work a shift of six hours or less, without taking a break, subject to the employer's agreement. It would therefore give both employers and employees greater flexibility in arranging breaks.

4. THE JUSTIFICATION FOR THE PROPOSED VARIATIONS

22. Given that the variations we seek to the Health Professionals Award and the Nurses Award are in relevantly similar terms and by their design, would have the same effect, we have set out below the reasons why our claim should be granted in relation to both of the awards.
23. The proposed amendment is designed specifically to address circumstances in which an employee seeks to work a five and a half hour to six-hour shift, such as is common for parents who wish to be able to drop their children off at school and pick them up after school.
24. In Ai Group's experience it is not uncommon for employers in the health industry to require part-time workers to work a quantum of part-time hours that is a multiple of 7.6 hours, that is: 7.6 hours, 15.2 hours, 22.8 hours or 30.4 hours. In such circumstances, a parent wishing to drop children off at school and then pick them up after school would typically wish to work 22.8 hours over four days (the equivalent of 5.7 hours per day).
25. Under the current award clauses an employee who works a five and a half to six hour shift is entitled to an unpaid meal break of at least 30 minutes. This equates to the employee being at the workplace for an additional half hour in circumstances where the employee may in fact prefer to work without a break and complete their shift earlier. If the meal break is taken the employee would

receive half hour less pay for the shift than what they would otherwise receive if they did not take the break as set out in the following example:

Start time: 9.00am **Finish time:** 2.30am **Hourly rate:** \$30.00

Compensation per shift if meal break is taken: \$150.00

Compensation per shift if meal break is not taken: \$165.00

Compensation per 5 shifts if meal break is taken: \$750.00

Compensation per 5 shifts if meal break is not taken: \$825.00

26. Clearly, many employees would prefer the extra income than to take an unpaid meal break during such a short shift. This is especially so given that under clause 27.2 of the Health Award and clause 27.2 of the Nurses Award, employees are entitled to a 10 minute paid tea break during the shift as well.
27. The Australian Workplace Relations Study First Findings Report (**AWRS Report**), which was produced by the Commission's research department on 29 January 2015 and is the first Australia-wide statistical dataset linking employee data with employer data since 1995, provides valuable insight into flexible working practices and employee preferences.
28. The AWRS Report found that, in terms of job satisfaction, the employees who participated in the study were most satisfied with having flexibility to balance work and non-work commitments above other aspects of their current jobs.⁴ That is, flexibility to balance work and non-work commitments was seen as the most satisfying aspect of their jobs.
29. Importantly, the AWRS Report also found that, regardless of industry, flexibility to balance work and non-work commitments is considered by the majority of employees to be the most important aspect of employment when considering their overall job satisfaction, even ahead of the work itself and

⁴ *Australian Workplace Relations Study, First Findings Report*, 29 January 2015, Tables 6.1 and 6.2, pp. 45-46. Available at: <https://www.fwc.gov.au/documents/awrs/awrs-first-findings.pdf>

pay. Almost one third of respondents (32%) considered the flexibility to balance work and non-work commitments to be the most important aspect when determining overall job satisfaction.⁵

30. The AWRS Report demonstrates that employees highly value flexibility in the workplace. Given this, and the fact that Ai Group's proposed variation is aimed at giving more flexibility to employees to balance their work and family commitments, the proposed variation should be granted. The variation will enable employers to accommodate requests by employees who wish to work a longer shift without an unpaid meal break in order to drop off/collect their children from school or meet other family needs and, in doing so, obtain the extra income that they would not have received had they been required to take the meal break.
31. The proposed variation would also reflect community expectations regarding the provision of flexible working arrangements to employees with caring responsibilities and be consistent with the overall scheme of the FW Act.
32. Apart from the fact that section 3(d) of the FW Act expressly provides that one of the objects of the Act is "*assisting employees to balance their work and family responsibilities by providing flexible working arrangements,*" the variation is consistent with the right to request flexible working arrangements under section 65 of the Act. This section provides employees with an avenue to request a change in working arrangements where the employee is a parent or has responsibility for the care of a child who is of school age or younger; the employee is a carer; or any of the other circumstances listed in section 65(1)(A) of the FW Act. The legislative note below section 65 clarifies that changes in working arrangements include changes in hours of work and changes in patterns of work. In this regard, it is arguable that the entitlement afforded by clause 27.1(a) presently precludes an employer from agreeing to a request made under section 65 thereby undermining the legislative intent of these sections of the FW Act.

⁵ Ibid at p.47. See table 6.1 on p.47.

33. It should also be noted that there is nothing in the history of clause 27.1 of the Health Professionals Award or the Nurses Award which provides any basis for opposing the variation. Clause 27.1(a) of the Health Professionals Award and clause 27.1(a) of the Nurses Award have been in the same terms since the awards were made and, to our knowledge, there are no prior decisions of the Commission or its predecessors, either relating to the Part 10A Award Modernisation Process or subsequent to it, that deal with the terms of the clauses. It appears that the provisions have not been the subject of any detailed consideration.
34. For the above reasons, there can be no sound justification for rejecting Ai Group's proposed variation. Our proposed variation is consistent with the legislative scheme of the FW Act which is clearly intended to accommodate an employee's caring responsibilities and other personal circumstances. It is also beneficial to both employees and employers.

Meal Break Provisions in Other Modern Awards

35. The proposed variations would reflect the type of flexibility afforded in many other modern awards. Indeed, several awards contain provisions that enable agreement to be reached as to be the period of time that must be worked to trigger an entitlement to a meal break, or enable an employee to elect to forego the break. For example:

- Clause 22.1(a) of the *Children's Services Award 2010* provides (emphasis added):

An employee will not be required to work in excess of five hours without an unpaid meal break of not less than 30 minutes and not more than one hour. Provided that employees who are engaged for not more than six hours continuously per shift may elect to forgo a meal break.

- Clause 31.1 of the *Hospitality Industry (General) Award 2010* provides:

An employee (including a casual employee) who is required to work a shift of more than five hours and up to six hours may elect to take an unpaid meal break of up to 30 minutes during the shift and the employer shall not unreasonably refuse the request.

- Clause 38.1(b) of the *Manufacturing and Associated Industries and Occupations Award 2010* provides:

An employee must not be required to work for more than five hours without a break for a meal except in the following circumstances:...

(b) by agreement between an employer and an individual employee or the majority of employees in an enterprise or part of an enterprise concerned, an employee or employees may be required to work in excess of five hours but not more than six hours at the ordinary time rate without a meal break.

- Clause 38.1(c) of the *Textile, Clothing, Footwear and Associated Industries Award 2010* provides (emphasis added):

No employee will be required to work for more than five hours without a meal break unless an employer and a majority of employees in an enterprise or part of an enterprise concerned agree to work in excess of five hours but less than six hours without a meal break, provided such agreement is in accordance with clause 8.3.

- Clause 24.1(b) of the *Pharmaceutical Industry Award 2010* provides:

Subject to clause 24.3, by agreement between the employer and an employee or the majority of employees in the plant, work section or sections concerned, employees may work in excess of five hours but not more than six hours at ordinary time rates without a meal break.

- Clause 32.1(b) of the *Food, Beverage and Tobacco Manufacturing Award 2010* provides:

An employee must not be required to work for more than five hours without a break for a meal except in the following circumstances:...

(b) by agreement between an employer and an individual employee or the majority of employees in an enterprise or part of an enterprise concerned, an employee or employees may be required to work in excess of five hours but not more than six hours at the ordinary time rate without a meal break.

36. Varying the Health Professionals Award and the Nurses Award, as proposed by Ai Group, would align the meal breaks clauses in these awards with those in many other modern awards. There is no apparent reason why the Health Professionals Award and the Nurses Award should reflect a less flexible approach.

Section 138 and the Modern Awards Objective

37. Ai Group's proposals should be adopted pursuant to section 138 of the FW Act as the provisions are necessary to achieve the modern awards objective.
38. The overarching obligation on the Commission derived from the modern awards objective, as espoused in section 134(1) of the FW Act, is to ensure that the modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.
39. Ai Group contends that the proposed variations ensure that the relevant awards, together with the NES, provides a fair and relevant minimum safety net taking into account the factors set out in section 134.
40. We consider each of these factors below.

The relative living standards and the needs of the low paid (s.134(1)(a))

41. The term "low paid" has a particular meaning as recognised by the Commission in its Annual Wage Review decisions:

[362] There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.⁶

42. The proposed variations foster the living standards and needs of the low paid by affording them a flexibility that is not presently contained in the relevant awards. To the extent that an employee is able to utilise this flexibility in order to accommodate their personal circumstances, and have the option of receiving extra income rather than taking a break during a short shift, the provision is clearly intended to meet the employee's needs.

⁶ *Annual Wage Review 2012-2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013-2014* [2014] FWCFB 3500 at [310].

43. Further, an employee cannot be deprived of a meal break at the employer's prerogative. The clauses would operate at the employee's election. As a result, we cannot foresee any disadvantage being visited upon an employee by virtue of the proposed provisions.

The need to encourage collective bargaining(s.134(1)(b))

44. The variations proposed would not run contrary to the need to encourage collective bargaining. We do not consider that the inclusion of the clauses nor their application would act as a disincentive to employers or employees in collective bargaining. There remains scope for parties to negotiate the inclusion of the clauses or a derivative of them, and any additional flexibilities or safeguards that are deemed relevant to the employer, employees and their bargaining representatives.
45. There is certainly no evidence to suggest that the inclusion of similar provisions in other modern awards have adversely impacted upon collective bargaining in those industries.

The need to promote social inclusion through increased workforce participation (s.134(1)(c))

46. To the extent that the proposed variations better accommodate the personal circumstances of employees and thus enable them to participate in the workforce, the amendments would clearly promote social inclusion
47. We have earlier referred to the example of a parent seeking to take their children to school in the morning, and pick them up in the afternoon. It is absurd that by virtue of the current clauses, as presently drafted, an employee cannot work a five and a half hour or six hour shift without a break such that they are able to subsequently drop off and pick up their children from school. The requirement that they take a half hour meal break will either mean that the employee cannot finish work until half an hour later, or the employee performs 30 minutes less of paid work and therefore earns less money. Either alternative is disadvantageous to such an employee.

The need to promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d))

48. For the reasons outlined earlier in this submission, the proposed amendment self-evidently promotes flexible work practices by providing an alternative to employees who wish to forgo their meal break. Where the employee's availability to work throughout their shift obviates the need for the employer to manage or coordinate their meal break with others in the workplace, the variation also promotes the efficient and productive performance of work.

The need to provide additional remuneration (s.134(1)(da))

49. This is a neutral consideration in this matter.

The principle of equal remuneration for work of equal or comparable value (s.134(1)(e))

50. This is a neutral consideration in this matter.

The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (s.134(f))

51. In circumstances where an employee elects to forgo their meal break, and is thus performing work for the entire duration of their shift, this has clear benefits in terms of productivity and efficiency for the business. It also avoids the unproductive scenario where an employee performs five hours of work, takes a break as required by the clause, and then returns to work for the remaining 30 minutes of their shift.

52. There could also be circumstances in which an employee is presently rostered to work for six hours, and the time at which they are to take their break falls (due to operational reasons) at the end of those six hours. The clause does not presently contemplate such a scenario or make any accommodation for it. In most if not all circumstances, we envisage that an employee would prefer

to finish work for the day and leave the business' premises. The variations we have proposed would allow them to do this.

The need to ensure a simple, easy to understand, stable and sustainable award system that avoids unnecessary overlap of modern awards (s.134(1)(g))

53. The proposed clauses are drafted in terms that are simple and easy to understand. They provide a flexibility that is not uncommon to the modern awards system and may therefore be seen to improve consistency. Similar clauses in other awards have not, to our knowledge, given rise to any confusion or ambiguity.

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h))

54. To the extent that the proposed clauses are consistent with sections 134(1)(b), (c), (d), (f) and (g), as we submit, they will have a positive impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

5. CONCLUSION

55. For the reasons outlined in this submission, Ai Group's proposed variations to clause 27.1 of the Health Professionals Award and clause 27.1 of the Nurses Award should be granted.