

**IN THE FAIR WORK COMMISSION**

**Matter No.: AM2014/196 and AM2014/197**

***Fair Work Act 2009***

**s.156 – 4 yearly review of modern awards**

**4 yearly review of modern awards – Common issue – Casual and Part-time employment**

**FINAL WRITTEN SUBMISSIONS OF THE ACTU**

DATE: 18 November 2016

D No.: 123/2016

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## A. Background

1. These final written submissions are filed on behalf of the Australian Council of Trade Unions ('ACTU') in accordance with direction [5] of the Directions issued 10 August 2016 in matters AM2014/196 and AM2014/197 ('these Proceedings') and in opposition to the variations proposed by Australian Business Industrial and the NSW Business Chamber Ltd ('ABI') and the St Ives Group ('St Ives') (collectively 'the Employer Groups') to the *Social, Community, Home Care and Disability Services Industry Award 2010* ('SCHADS Award') and the *Aged Care Award 2010* ('Aged Care Award') (collectively, the 'Health Awards'). The Employer Groups' claims are supported also by Jobs Australia. We note St Ives has withdrawn their claim in the *Nurses Award 2010*.
2. The ACTU's case in response to the Employer Groups' claims in the Health Awards is outlined in our submissions filed 2 May 2016 in the proceedings and need not be reiterated in full here. We rely also on the evidence and submissions presented in our common claim in the proceedings.<sup>1</sup> Comprehensive final written submissions were filed jointly by United Voice, the Australian Services Union and the Health Services Union on 11 November 2016 which we support and adopt. It is necessary here to make only some supplementary submissions.
3. In summary, the Employer Groups' claims seek to vary the Health Awards to provide more employer-oriented flexibility regarding part-time employment and all employees' rostering notification arrangements by removing significant employee protections. They argue this is necessary in order to avoid casualisation of the affected industries as a result of the variable demand and cost pressures they claim the National Disability Services Scheme ('NDIS') will introduce. In essence, the heart of their case is that part-time employment is beneficial for employees, employers, clients and also clients' families and in order to preserve permanent employment and prevent casualisation, it is necessary to make it more flexible.
4. As a result, there is obviously an inescapable contradiction in the Employer Groups' case: on the one hand, it seeks to establish the importance of the security afforded by part-time employment in the affected industries, and on the other, to undermine that

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<sup>1</sup> As flagged in the Memorandum of Understanding between the parties forwarded to President Ross's chambers on 22 December 2016.

very security provided by part-time employment and the source of its benefits for all concerned. There is little point in a strategy aimed at ensuring more workers gain permanent rather than casual employment if the conditions of permanent employees are simply reduced to approach that of casual employment in the process. The Employer Groups' case fails to acknowledge that the benefits of permanent employment for all parties are predicated upon the working time security that their case seeks to undermine.

5. The existing awards already allow for the hours and pattern of work of part-time employees to be varied by agreement and the evidence in the proceedings suggests employees in the industry are generally accommodating of such changes.<sup>2</sup> The Employer Groups' claims instead seek to empower employers to set and vary employees' hours after commencement unilaterally and at will: they invite the Fair Work Commission ('the Commission') to use its modern award powers to *expand* managerial prerogative.
6. The ACTU has led extensive evidence about the problem of insecure work in Australia, including that casual employment has grown and continues to subsist at high levels in this country because it allows employers to minimise their costs by shifting risk onto employees. Part of this cost-shifting involves making employees bear the cost of variable demand through variable and disaggregated working hours. This shifting of risk is often described by employers as increased 'flexibility'. It is facilitated by regulations, such as those sought here, that facilitate greater managerial prerogative at the expense of employee security.
7. Hence, the Employer Groups' claims must be seen for what they are: merely a means for expanding employer-oriented 'flexibility' into the previous sanctity of permanent employment. St Ives' own submission describes their claim as establishing "effectively a new category of part-time employment which can be termed 'flexible part-time employment'."<sup>3</sup> With approximately 40 per cent of Australian workers now

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<sup>2</sup> For example, see the lay evidence of Elizabeth Nicholls who agreed to change her pattern of hours on at least two occasions and said she works additional shifts when asked: Exhibit 262 at para [17], [22], [26]. Veronica Keane also gave evidence that she accepts additional hours whenever offered and that the level of flexibility in the SCHADS Award means she 'already feel[s] like a casual employee': Exhibit 258 [17], [33]; see also statement of Hajistassi ,Exhibit 248 [14-15].

<sup>3</sup> See Final [Submissions](#) of St Ives, 30 September 2016, para [8].

in insecure work,<sup>4</sup> employers strike also at the bedrock of permanent employment security. The ACTU calls on the Fair Work Commission ('the Commission') to halt this progressive destruction of the safety net and standard employment protections.

8. For such radical claims, the Employer Groups present no expert evidence or empirical data, merely lay evidence from a small number of employers with a direct and obvious short term financial interest in the claim.
9. The claims must be rejected. They are not necessary in order to meet the modern awards objective as there are more appropriate avenues in the existing awards and via changed operational practices, as well as via collective bargaining, for addressing any variable demand. The claims, in any event, would undermine the conditions of many employees working in sectors incapable of being affected by the NDIS Scheme.

## **B. The Employer Groups' Claims in the Health Awards**

10. As previously submitted, currently, under the affected awards, part-time employees have a right to guaranteed hours of work, including guaranteed quantum of hours, days of work and start and finish times and protections against increased or decreased hours and future rostering variability. Both of the Health Awards state that:

Before commencing employment, the employer and employee will agree in writing on a regular pattern of work including the number of hours to be worked each week, the days of the week the employee will work and the starting and finishing times each day...<sup>5</sup>

11. Clause 10.3 (c) of the SCHADS Award states that, 'Any agreed variation to the regular pattern of work will be recorded in writing'.
12. Our previous submissions outline how the Employer Groups' claims radically depart from these protections. ABI's claim has since been amended and it is necessary to address that amended claim here.

### ABI's Amended Claim

13. ABI's Amended Draft Determination<sup>6</sup> seeks in the main to insert the following substantive additions to clause 10.3 of the SCHADS Award:

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<sup>4</sup> See *Lives on Hold* report, p5, attachment to Witness Statement of Brian Howe dated 11 November 2015 [Exhibit 108].

<sup>5</sup> See clause 10.3(c) of the SCHADS Award and clause 10.3(b) of the Aged Care Award.

<sup>6</sup> See [Amended Draft Determination](#) filed by ABI on 5 July 2016.

(d) Despite anything else in this clause 10.3, an employer and an employee may agree not to fix the employee's hours of work if the employee is engaged to provide supports to clients in circumstances where the client has discretion to vary when the support is provided. In these circumstances:

(i) before commencing employment the employer and the employee will agree in writing on:

(A) the number of hours to be worked each week (or the average number of hours); and

(B) the days and/or times of the week that the employee is not available to work (if any);

(ii) the employee's hours will be set by the employer in accordance with clause 25.5, save that the employee will not be required to work on those days or at those times referred to in clause 10.3(d)(i)(B).

(iii) Any agreed variation to the employee's availability or to the number of hours to be worked must be recorded in writing.

14. Under ABI's proposal, employees captured by clause 10.3(d) may agree that only the employees' unavailability be set before commencement of employment and this unavailability can then only be varied subsequently with the employer's agreement. The employer may then unilaterally roster hours outside that unavailability. Given this occurs before commencement during the recruitment process, many employees are likely to feel compelled to agree to accept this reduction in security and to overstate their availability, in order to secure the position. If the employees' unavailability changes after commencement, they may only vary it with the agreement of the employer.

15. Hence, such part-time employees are likely to be subject to variability in hours of work, and a wider span of hours of work and a greater risk of inconvenient hours than they are under the Health Awards as they stand. In essence, given the loss of various forms of hours security, their employment is likely to resemble casual employment without payment of a casual loading. Under the proposed changes, the employer may unilaterally roster an employee within their availability as follows:

(a) On any day and different days from fortnight to fortnight;

(b) In multiple shifts per day and different combinations of shifts per day from fortnight to fortnight;

- (c) On a potentially wide combination of number of shifts per week, varying from fortnight to fortnight;
  - (d) On different lengths of shift without the ability to reject short shifts even if they are unviable;
  - (e) At varying start and finishing times, potentially changing from fortnight to fortnight;
  - (f) At consistent times for any number of fortnights giving rise to a false sense of regularity that is always subject to the risk of dramatic changes on any given fortnight, making planning one's life difficult;
  - (g) without consultation and subject only to the agreed quantum or average quantum of weekly hours, averaged over a month, and the low minimum hours of engagement protections per shift under the award; and
  - (h) without the ability for employees to change their unavailability without the employer's agreement.
16. Our previous submissions pointed to the very limited minimum hours of engagement protections under the Health Awards but contained one error: the SCHADS Award in fact contains *no minimum hours of engagement protections* whatsoever for part-time employees. Hence, there is significant risk of part-time employees' hours being greatly disaggregated and the span of ours within which they work being greatly expanded.

### St Ives' Claim

17. St Ives' proposed variations<sup>7</sup> would undermine the security of part-time employment even further and in relation to all employees engaged under both of the Health Awards. Their proposal to vary the SCHADS Award would vary the hours protections in clause 10.3 to provide merely that:

(c) The employer and employee will agree in writing on a minimum number of hours to be worked each fortnight and the employee's available days and hours of work.<sup>8</sup>

18. The proposal also states that:

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<sup>7</sup> See [Submission and Draft Determination](#) of St Ives, filed 17 July 2015.

<sup>8</sup> See clause 10.3(c) of St Ives' draft determinations regarding the SCHADS Award and clause 10.3(b) of St Ives' draft determinations regarding the Aged Care Award.

(e) Nothing in clause 10.3(c) or (d) is intended to prevent the employee being offered, or accepting additional hours of work.

19. St Ives' claim in relation to the Aged Care Award is in the same terms.
20. Both St Ives and ABI's proposals allow greater capacity for employers to roster split shifts, short shifts and to vary hours of work unilaterally through rostering arrangements.
21. Under St Ives Group's proposals, the security of quantum of hours is further reduced and the proposal introduces significant income insecurity. The current guarantees under the relevant awards vis-à-vis fixed quantum of hours, days of work, length of shift and start and finish times would be reduced to a core *minimum* of number of hours of work to be worked each week plus 'additional' hours. The rostering pattern of the minimum hours are not guaranteed fortnight to fortnight and are unilaterally determined in shift length, start and finish times and spread of hours by the employer within the employee's availability. The additional hours component is even more contingent – such hours would not be guaranteed in quantum or pattern.
22. There is no limit in the proposed terms as to how low an employee's minimum hours may be set, so it could be as little as zero, with the remainder of hours worked on a variable basis. In that event, all hours could subsequently be set and varied unilaterally by the employer through rostering arrangements and no casual loading would apply. These hours are not prescribed by the employee's availability regarding his or her minimum hours of work and could be rostered at any time or day of the week, in practice limiting employees' ability to restrict their availability or span of working hours.
23. St Ives' claim would also remove other existing rostering protections under the Health Awards by allowing employers to give less notice of rostering arrangements and remove the requirement that rosters must be displayed in the workplace. If the roster is displayed, it would only need to be displayed seven days before it starts. The roster may be communicated by telephone, direct contact, mail, email or facsimile without any prescribed notice at all.
24. Under St Ives' proposal to the SCHCDS award, employees would lose the right to get paid if they are not notified of a client cancellation by 5PM the day before (albeit that they currently might be required to work make up time for the pay provided).

### **C. The Importance of Security of Working Time and Pattern of work**

25. The ACTU has filed extensive evidence in the proceedings in support of its common claim about the importance of the various components of security of employment to employees and how the lack of such security disaffects casual employees.
26. For example, Professor Markey gave evidence that security of the pattern of hours of work, control over working hours and the ability to contain the span of hours (not just the quantum of hours or security of income) are significant components of employment security that casual employees lack, thereby undermining the foundation of regular and predictable hours that is necessary in order to support employee-oriented flexibility.<sup>9</sup> He notes that the academic literature shows that variability and lack of control over hours contributes to higher work-life conflict and lower job satisfaction.<sup>10</sup> Further, stress, anxiety and frustration in the workplace is "particularly associated with a lack of control over hours of work and the employment relationship more generally."<sup>11</sup>
27. The Employer Groups' Claims would only subject part-time employees to these consequences, undermining the value of part-time employment for employees. As Professor Markey noted:

...we see no benefit to be gained for employees in making permanent part-time work more closely approximate the conditions under which casuals work by reducing minimum engagements, minimum guaranteed hours, or increasing other variability in days of work. Indeed, this would only serve to subject part-time workers to the same feelings of powerlessness and being on-call and at the mercy of employers' whims as many casuals currently experience.<sup>12</sup>

28. Indeed, Professor Markey noted that:

If anything, we think it likely that it would be more beneficial to move in the opposite direction, making casual conditions more closely approximate those enjoyed by their part-time counterparts.<sup>13</sup>

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<sup>9</sup> See Professor R.Markey and Dr J.McIvor, Report on Casual and Part-Time Employment in Australia, dated 23 September 2015, attachment 'RM-2' to the Statement of Professor Raymond Markey dated 19 October 2015 (Exhibit 110) ('First Expert Report') pp19-20;

<sup>10</sup> Ibid.

<sup>11</sup> Ibid p31.

<sup>12</sup> See Witness Statement of Professor R, Markey dated 9 March 2016 [Exhibit 111], attachment RM- 4, Second Supplementary Expert Report of Professor Markey et al, p20-21.

<sup>13</sup> Ibid p21.



29. This expert evidence was supported by that of Dr Muurlink, who gave evidence as to the necessity for employees' to have a sense of control over their working hours and working patterns. He gave evidence that a lack of control and variability has a significant impact on employees' health, both psychologically and physically and results in 'closing windows' of socialisation and self-care.<sup>14</sup> The actual impact of lack of control on part-time and casual employees is likely to be even greater than the literature suggests. Dr Muurlink gave evidence that the studies in this area are biased towards the top end of the sector, including towards doctors and surgeons, whilst the impact of lack of control will be amplified at the bottom end where employees would generally have fewer financial, educational and other resources to buffer some of the negative effects of variability and unpredictability.<sup>15</sup> There was no evidence that the impact of variability and lack of control is experienced differently by employees in different industries so the ACTU's evidence about the impact of insecurity and variability on employees in all industries is relevant to the Employer Groups' claims.
30. A number of employees in the proceedings gave evidence about the negative impacts of variable and disaggregated working time and variable income, including:

- (a) Scott Quinn, a casual Disability Support Worker, who gave evidence that:

The biggest problem with working short shifts is the length of time it takes on a given day to work a 'full day[']s work'. For example, on 5/7/14 I started work at 7:30am and worked through until just after midnight (12:03am). I had no splits that day [ie no split shift allowances applied] and only accrued 9 hours and 53 minutes work but I didn't finish work until 16 hours after beginning my working day.<sup>16</sup>

Mr Quinn gave evidence that it was difficult for him to rely on having set times where he was on or off work and hence rarely takes social activities on days of work. Compared to when he worked on a permanent basis from 7am to 3pm, 5 days per week, he said his work was more difficult to manage overall;<sup>17</sup>

- (b) Linda Rackstraw, who gave evidence about working as a casual Crew Member at McDonalds. She gave evidence that:

Throughout my employment at McDonalds I did not have control over my number or hours or earnings or my days of work and this made things difficult... My managers decided how

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<sup>14</sup> See Transcript PN6345-PN6348; Report of Dr Muurlink entitled *Predictability, Control and Working Schedules*, dated 14 May 2016, [Exhibit 265].

<sup>15</sup> See Transcript at PN6461-2

<sup>16</sup> Statement of Scott Quinn [Exhibit 11], para [43].

<sup>17</sup> *Ibid*, paragraphs [49]-[50].

many hours I worked and on what days, and the days and times of work would vary dramatically, even if my number of hours stayed reasonably consistent.<sup>18</sup>

She said that:

Due to having very little control over my shift times and days of work, I found it difficult to plan my life and to spend time with my family. For example, I couldn't say to my daughter, 'let's go for a coffee (on a particular day) next week' because I wouldn't know my shifts until the roster came out and I'd often have to cancel if there was a clash. I was always cancelling things with family. So I made less plans and enjoyed less social engagements than when I was working permanent-part time.<sup>19</sup>

Ms Rackstraw found it difficult to keep appointments and was unable to accommodate a second job due having to be available for a wider span of hours than she worked. She gave evidence she also continually worried that her hours would be reduced and a sudden drop in hours and income caused her significant financial strain. In order to exert control over her hours and income, she tried several times unsuccessfully to be made permanent.

(c) Veronica Keane, a Community Support Worker, gave evidence about long gaps between shifts causing her to have to "[h]ave a sleep in the car, or sit in the car and read for hours".<sup>20</sup>

31. The ACTU has filed extensive evidence showing that the insecurity and variability associated with casual employment contributes to gender inequality. The claims are likely to further exacerbate this problem by introducing further insecurity and variability into feminised industries.<sup>21</sup>

### Case Study Regarding Hours Variability

32. To illustrate just how radical ABI's claim is, we present the following hypothetical case study involving 'Jane', utilising rostering practices permissible under the SCHADS Award as ABI seeks to vary it. As outlined above and in our previous submissions, St Ives' proposals are yet more radical and facilitate even greater variability. As will be seen below, Jane's roster is unrecognisable as permanent employment as we know it.

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<sup>18</sup> Statement of Linda Rackstraw [Exhibit 10] at para [11]-[12].

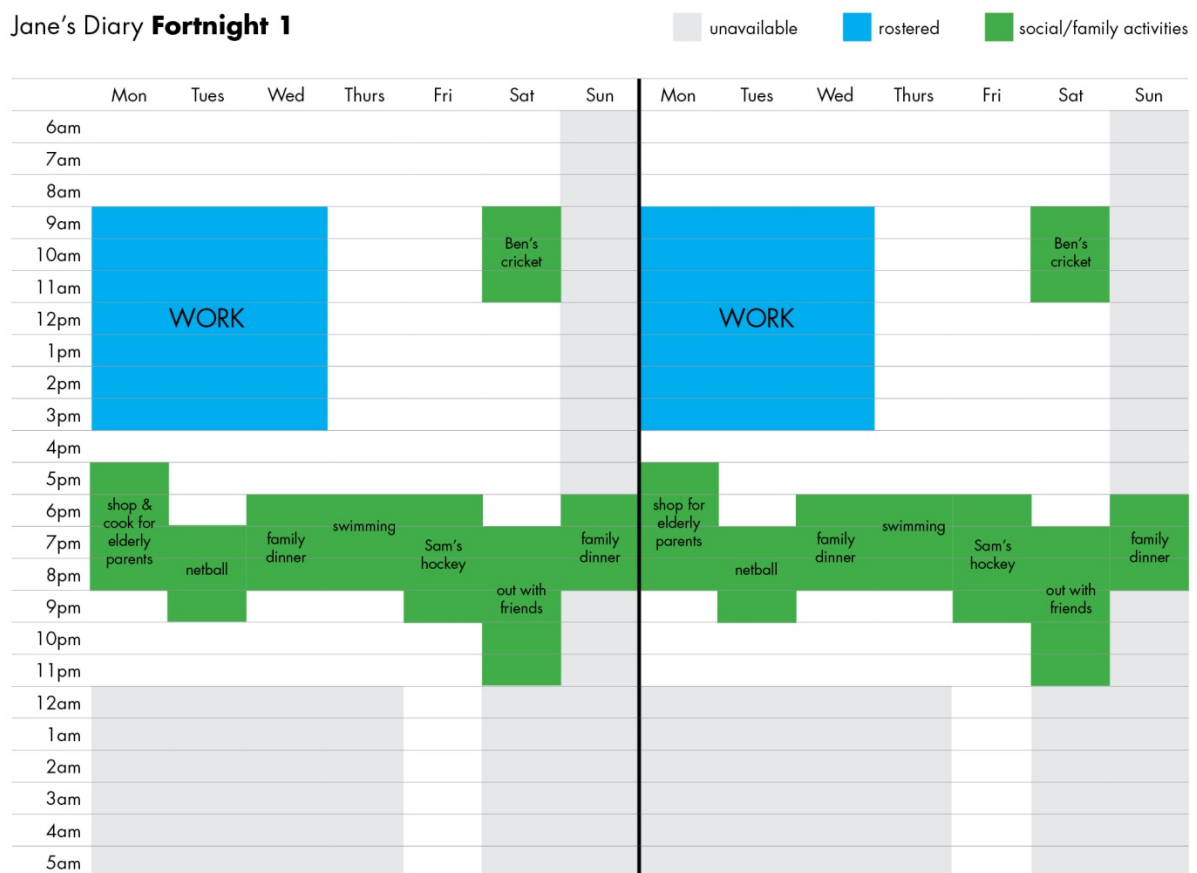
<sup>19</sup> Ibid, para [14].

<sup>20</sup> Transcript at PN6216.

<sup>21</sup> See First Expert Report at p23 which confirms the affected industries are heavily feminised.

33. Jane works as a part-time Disability Worker Level 2, employed under the SCHADS Award for an average of 42 hours per fortnight. Her employer is funded by the NDIS. She agrees to be available Monday to Friday during ordinary hours and all of Saturday as she has two primary-school-aged children (Ben and Sam) and wants time with her family at nights and on weekends.
34. For 6 months, Jane's roster is similar to that depicted below in her diary as 'Fortnight 1'. As a result, she organises childcare Monday to Wednesday and the various social and family activities shown.

Jane's Diary **Fortnight 1**



35. Suddenly, her roster is changed as depicted in 'Fortnight 13' and then varied again as depicted in 'Fortnight 14' without consultation. There are significant clashes with her social life and schedule outside work. Her shifts have become significantly shortened and disaggregated with long breaks between shifts and the span of her hours has significantly increased. She must now find child care from Monday to Saturday instead of Monday to Wednesday and for a greater span of daily hours.

Jane's Diary **Fortnight 14**

unavailable  
  rostered  
  social/family activities  
  conflicting times



Jane's Diary **Fortnight 13**

unavailable  
  rostered  
  social/family activities  
  conflicting times



36. As the above makes clear, the span of hours and displacement of social activities that the ABI's claim would make possible could be greater than that of regular full-time employment, with variability akin to casual employment. Yet Jane, in the above example, would only be paid for 42 hours per fortnight and without any casual loading. Apart from receiving penalty rates on Saturdays, she would receive no additional loading under the SCHADS Award for this increased disruption to her social life and variability as the rostered hours do not engage the span of hours and broken shift allowances under the award. The award as varied would not provide her with the ability to reject any of the roster changes without her employer's consent.

#### **D. Employer Groups' Arguments and Evidence**

37. The Employer Groups argue that the increased employer-flexibility they seek is necessary in order to accommodate the more client-focussed and flexible provision of care that they argue is envisaged by the NDIS scheme, currently being rolled out across Australia. They argue the scheme will result in cost pressures and necessitate more flexible part-time employment in order to avoid employers choosing to casualise the industry, an outcome they agree would be detrimental to clients, service providers and employees alike.

##### The Impact of the NDIS Scheme on Casualisation

38. The Employer Groups' evidence of present or future casualisation was thin and contradictory. No empirical data of recent casualisation within the relevant industries was adduced. Speculative evidence about why this might occur in future was tendered in the form of lay witness evidence representing a handful of employers. Much of this evidence suggested the probability of the current award causing casualisation if it was not made more 'flexible' was low as:

- (a) Several employers gave evidence that they are strongly committed to maintaining permanent employment where possible. For example, Hugh Packard, Chief Executive Officer of Valmar Support Services Ltd ('Valmar'), gave evidence that:

Valmar has for many years sought to keep the percentage of casual employees in the organisation as low as possible, and to engage staff on a permanent basis wherever practicable. This reflects Valmar's strong commitment to its clients and its desire to provide

clients with consistent, predictable and known staff members to support them, to the extent we can. Valmar invests heavily in securing, retaining, training and developing our permanent workforce;<sup>22</sup>

- (b) Employers gave evidence that casualising their workforce was against their clients' wishes and they are receptive to their clients' concerns; clients have an interest in maintaining the same carer, developing relationships with them and accommodating their needs also.<sup>23</sup> In general, clients want continuity of service and to use the same worker and have an interest in accommodating workers' needs. This is an industry where the worker-client relationship is paramount, valued and protected by both parties. Indeed, Mr Packard said that:

...staffing consistency, especially when those staff members are going into their homes, is of paramount importance;<sup>24</sup>

- (c) Service providers have various means of managing variability through setting the terms of their service contracts with clients. They are not required to accommodate any service requests they do not wish to and can refuse any supports their rostering arrangements cannot support. They are not required to enter into service agreements with any particular client or to deliver all of those clients supports;<sup>25</sup>

- (d) Clients will accept limits on the services available or the time of service in order to ensure higher quality care. Matthew Bowden, Co-Chief Executive Officer for People with Disability Australia, gave evidence that:

...people with disability must not be characterised as unreasonable, unpredictable or irrational people who expect to have their preferred staff 'on call' to respond to their whims. People with disability are aware of the constraints that workers operate under and in some instances are also disability support workers themselves... In our experience people with disability value continuity of support and are likely to seek to retain "good" staff on a regular basis. They frequently express immense frustration with having to repeatedly 'train' new support workers in how to provide person-centred services to them as a result of a highly casualised and transient workforce. To our knowledge, the majority of NDIS participants want to employ staff regularly and over the long-term;<sup>26</sup>

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<sup>22</sup> Witness Statement of Hugh Packard, [Exhibit 254], para [24] – [26].

<sup>23</sup> Witness Statement of Hugh Packard, [Exhibit 254] para [27] – [32].

<sup>24</sup> Ibid, para [32].

<sup>25</sup> For example, see evidence of Kenneth Baker at Transcript PN4770-4772.

<sup>26</sup> Witness Statement of Matthew Bowden [Exhibit 249] at para [9],[10].

- (e) The NDIS will provide a large increase in public funding and is likely to result in a large increase in demand for support and, if anything, a shortage of providers. In an equal regulatory playing field, all providers will have to accept limits on working time variability in order to provide good quality care jobs;
- (f) The evidence confused variability in service requests with variability in total work demand and rostering arrangements, failing to account for the ways in which work could be scheduled and organised in aggregate to accommodate roster certainty. Instead of acceding to client demands for services at a particular time, service providers could offer a window of time of worker availability. Kenneth Baker conceded this was consistent with general practices in service provision in the community.<sup>27</sup> Offering a window of availability would allow for work to be aggregated to provide more consistent and longer shifts as in other industries;
- (g) Much of the work is likely to be predictable, known far in advance and can be scheduled. Matthew Bowden gave evidence that:

It is also critical to note that for the majority of people requiring disability supports their needs will be regular and predictable. For example, a person requiring personal care every morning before work will be likely to require it at the same time, every working day, for every working week of the year;<sup>28</sup>

- (h) The NDIS Scheme's objectives could not be said to require subordinating service workers' need for security to a client right to instant, on-call service; that the ordinary expectations of the community include having to wait for a service to accommodate a service worker's needs;<sup>29</sup> and
- (i) Greater flexibility can be gained through collective bargaining if necessary. Mr Packard conceded his organisation, Valmar, had already achieved the flexibility they required through collective bargaining.<sup>30</sup>

#### Impact of the NDIS scheme on Cost Pressures and Profit Margins

39. The Employer Groups' argument that the NDIS will introduce cost pressures necessitating the proposed changes is also overstated.

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<sup>27</sup> See Transcript at PN4858-62.

<sup>28</sup> Witness Statement of Matthew Bowden [Exhibit 249], para [10].

<sup>29</sup> See Transcript at PN4858-62.

<sup>30</sup> See PN5697-5700 of transcript.

40. The Employer Groups essentially argue that there is not enough government funding under the NDIS scheme to accommodate permanent employment under the Health Awards as they stand. We submit this is not an argument that the Commission ought to entertain. To do so would set a dangerous precedent and threat to the independence of the Commission in maintaining the safety net. We submit the Commission's relevant task as an independent statutory body is to ensure that the safety net is fair and relevant and that includes setting absolute standards. Government must take the Commissions' determinations into account in setting and reviewing funding, not the reverse. The NDIS Scheme is subject to review and if more or differently allocated funding is required, that is a matter for government.
41. The Commission heard evidence from a small number of private service providers about the effect of the NDIS on their profit margins. The Commission should not be concerned with the effect of a government-funded scheme on profit margins. If the government has determined to lower operating margins and, as a result, to encourage non-profit service provision over for-profit services, that is a matter for them. Governments often make decisions that change market dynamics in funded sectors – for example, the Federal government's recent policy changes regarding the availability of 'VET FEE HELP' which have affected funds available to educational institutions and intermediaries, or the abolition of the 'Pink Batts' scheme. It should not be assumed that the Commission will blindly re-allocate all of the risk associated with entry into a sector that is dependent on such policy decisions from time to time to the employees in those sectors. That is not the Commission's role.
42. The employers' contention that the NDIS will create cost pressures necessitating more employer-oriented flexibility in order to avoid casualisation is wrong in any event for the following reasons:
- (a) Firstly, demand is not likely to vary as significantly as claimed and variability in client supports does not equate to variability in working hours as explained above; and
  - (b) As previously submitted, employers have various options as to how to manage variable demand whilst offering stable working hours, even in a low-cost environment. The evidence suggested that employers were not fully exploring those options.



## E. Modern Awards Objective

43. Our previous submission outlines how the modern awards objective requires that the Employer Groups' claims be rejected. We further submit the following.
44. Section 134(1) of the Fair Work Act 2009 requires that the Commission ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account "(da) the need to provide additional remuneration for... employees working unsocial, irregular or unpredictable hours". The proposed changes would provide for unsocial, irregular and/or unpredictable hours without additional remuneration. In the case of St Ives' claim, where an employees' fixed hours could be divided into 'minimum' hours and 'additional', contingent hours, employees are likely to not only experience unpredictable working hours, but also income variability and hence, in some cases, *less* remuneration than if they had fixed hours of work.
45. Subsection 134(1)(g) requires also that the Commission take into account "the need to ensure a simple, easy to understand, stable and sustainable modern award system..." ABI's claim introduces significant ambiguities and uncertainties. The category of employees in clause 10.3(d) of ABI's draft determination is ill-defined. The capacity for this clause and those proposed by St Ives to apply to a wide variety of employees unaffected by the NDIS changes suggest the variations would fall foul of the requirement that the award "only include terms to the extent necessary to achieve the modern awards objective".<sup>31</sup>
46. Subsection 134(1)(c) requires the Commission to consider "the need to promote social inclusion through increased workforce participation". Undermining the security of working time that supports employee-oriented flexibility would undermine the workforce participation of women with family and caring responsibilities.
47. The Employer Groups' claims also leave entirely ambiguous how the permitted variability in part-time employment in clause 10.3 as proposed would interact with the definition of part-time employment in the Health Awards that part-time employees are those employees with 'reasonably predictable hours of work'. This could have the

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<sup>31</sup> See *Preliminary Jurisdictional Issues decision* [2014] FWCFB 1788; s138 FW Act.

possible consequence that some employees may be rendered casual employees without being paid a casual loading and in breach of the award.

## **F. Conclusion**

48. In conclusion, we submit the modern awards objective and the maintenance of a fair and relevant safety net requires that the Employer Groups' claims in the Health Awards be rejected. Existing arrangements allow for all the flexibility necessary. The principal difference between current arrangements and those proposed by the Employer Groups is that currently employees must *consent* to variations to their working hours and working time and, given the impact those changes may have on their lives, that is as it should be.

**18 November 2016**

ACTU