

**Four Yearly Review of Modern Awards – Part-time employment – ‘NDIS and related issues’**

**FINAL SUBMISSION OF UNITED VOICE, HEALTH SERVICES UNION AND AUSTRALIAN SERVICES UNION**

**I – Introduction**

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1. This submission concerns variations proposed by Australian Business Industrial (‘ABI’) to the *Social, Community, Home Care and Disability Services Industry Award 2010* (the *SCHDS Award*) and by St Ives Group Pty Ltd (‘St Ives’) to the *SCHDS Award*, and the *Aged Care Award 2010* (‘the *Aged Care Award*’) (collectively: ‘the care awards’). We note that St Ives has withdrawn its claim in relation to the *Nurses Award*.
2. United Voice, the Australian Services Union and the Health Services Union (‘the Unions’) oppose the applications. The current part-time work provisions in the care awards are appropriate for the conditions in the care sector and meet the modern awards objective.
3. The employers seek to vary the care awards to increase the irregularity and unpredictability of the hours of work of part-time employees. They assert that regulatory and funding changes have so changed the industries covered by the care awards that part-time employment is at risk of disappearing. However, the employers have not supported their claim with either sufficient probative evidence or detailed submissions to justify the changes. The case for change has not been made.

***The variations sought***

4. The employer parties are seeking to remove the requirement for the employer and the employee to agree to a regular pattern of work, including the days of the week the employee will work and the starting and finishing times each day.
5. ABI’s claims purport to relate to the disability care sector, which is covered by the *SCHDS Award*. They cite the introduction of the National Disability Insurance Scheme (‘NDIS’) as the service provision model for disability care as the reason for the variations. Jobs Australia supports ABI’s application.

6. St Ives' claims relate to the home care sector, which is covered by the *SCHDS Award*, and the residential aged care industry, which is covered by the *Aged Care Award*. They cite the introduction of Consumer Directed Care ('CDC') as the service provision model for aged care as the reason for the variations.

***The employers' arguments***

7. The employers rely on the following arguments in support of their application for reducing conditions of part-time employees.
8. Firstly, the employers argue that there is a 'tension' between the contractual guarantee of fixed start and finished times and the definition of a part-time employee as one who 'has reasonably predictable hours of work'.
9. Secondly, that part-time employment provisions operate as a barrier to the employment of workers on a permanent part-time basis, especially in services which are subject to individual client choice and control. It is submitted that this requirement to specify start and finish times on commencement as a contractual right reduces the ability of employers to guarantee minimum weekly hours because of the likelihood of some variation over time. Increasing the irregularity of part-time work will allow employers to offer it to more employees, extending the benefit of part-time work to more employees.
10. Thirdly, that the current part-time provisions have contributed to an increase in casual employment in the care sector because the increased incidence of individual services and out of home care due to the NDIS and CDC makes it impossible to offer a regular pattern of work that guarantees the days of work, including start and finishing times.
11. Finally, the variations proposed by ABI and the NSWBC and St Ives will address the barriers to employment of workers on a permanent part-time basis where the work is ongoing and reasonably predictable.
12. The Unions reject these arguments because:
  - a. It is inaccurate to describe the interaction of the definition of part-time employment as employment with 'reasonably predictable hours of work' and the contractual guarantee of start and finishing times as a 'tension'. This argument is little more than sophistry. This will be addressed in Section IV.
  - b. Increasing the irregularity and precariousness of part-time work is not a solution to the problem of casualization. In fact, the variations will only extend the noted problems with irregular and precarious work to more employees. The workers in

these industries are mostly women who seek part-time employment to manage responsibilities outside work. Increasing the irregularity and precariousness of part-time work will reduce the ability of women with carers' responsibilities to participate in the disability and homecare workforce which in turn will create enormous challenges for employers to attract and retain the skilled workforce necessary to provide quality support to people with disability and aged people. This will be addressed in Section V.

- c. There is no probative evidence before the Commission that the increase in casualization of employment in the disability sector is a permanent phenomenon that requires remediation. Making part-time employment more like casual employment will not resolve the issue of casualization in the disability sector, instead it will expand the number of workers subject to precarious and irregular types of employment. This will be addressed in section VI.
- d. There is no probative evidence before the Commission that the requirement to specify start and finish times on commencement as a contractual right reduces the ability of employers to guarantee minimum weekly hours because of the likelihood of some variation over time.
- e. There is no probative evidence before the Commission of industry-wide adjustments to the employment of part-timers in the home care sector, covered by the *SCHDS Award*, due to the introduction of Consumer Directed Care. This will be addressed in Section VII.
- f. There is no probative evidence *at all* regarding the *Aged Care Award*, which covers the residential aged care industry. This will be addressed in Section VIII.

## **II – The proper approach to the applications**

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13. In conducting the four-yearly review of modern awards, the task of the Full Bench is governed by statute. Section 156 of the *Fair Work Act 2009* (Cth) (*the FW Act*) sets out the requirement to conduct the review. The Commission has broad discretion as to the conduct of the review, but each modern award must be reviewed in its own right.<sup>1</sup> The Commission must ensure that the modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions, taking into account the modern award objective set out in s 134(1) of the FW Act.

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<sup>1</sup> *Fair Work Act* s 156(5).

14. The Commission should adopt the approach of the preliminary Full Bench Decision about the Review:<sup>2</sup>

*“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. In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.”*

15. The Commission’s task in these proceedings is simple. The Commission must be satisfied that any variation to the care awards is *necessary* to achieve the modern award objectives.<sup>3</sup> Since the proposed variations are substantive, any case for change must be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.<sup>4</sup>
16. What is ‘necessary’ in a particular case is a value judgment based on an assessment of the considerations in s.134 (1), having regard to the submissions and the evidence directed to those considerations.<sup>5</sup> Further, the Commission should recognise a distinction between that which is ‘necessary’ and that which is ‘merely desirable’.<sup>6</sup>
17. The part-time provisions in both the *Aged Care Award* and the *SCHDS Award* were contested at both Award Modernisation and the Transitional Review of Modern Awards (discussed below). Therefore, the Commission should proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.<sup>7</sup>
18. In the absence of cogent reasons for not doing so, the previous Full Bench decisions should be followed.<sup>8</sup>

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<sup>2</sup> *Re Four Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788, (2014) 241 IR 189 (*Jurisdictional Issues Decision*), [60].

<sup>3</sup> *Fair Work Act* s 138.

<sup>4</sup> *Jurisdictional Issues Decision*, [36]; *4 Yearly Review of Modern Awards: Security Services Industry Award 2010 (AM2014/89)* [2015] FWCFB 620, [8] (Watson VP, Kovacic DP, Roe C); *Jurisdictional Issues Decision*, [60].

<sup>5</sup> *Jurisdictional Issues Decision*, [36].

<sup>6</sup> *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] 205 FCR 227; 219 IR 382.

<sup>7</sup> *Jurisdictional Issues Decision*, [24].

<sup>8</sup> *Jurisdictional Issues Decision*, [27].

### III – Award History

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#### *Relevance*

19. The part-time provisions in the care awards were vigorously contested at Award Modernisation and in the Transitional Review of Modern Awards. Following the approach to the review set out above at paragraphs 15 to 18, the Commission should only depart from its previous decisions if there are cogent reasons for doing so.

#### *Modernisation of the care awards*

20. On 28 March 2008, the AIRC received the Request to Modernise Awards from the Minister of Employment and Workplace Relations (*'Award Modernisation Request'*).
21. The health and welfare services industry was allocated to two different matters to be dealt with at different stages of Award Modernisation process.<sup>9</sup>
22. Health and welfare services, excluding social and community services, were dealt with in a single panel during Stage 2 of Award Modernisation. This included a mixture of occupational awards (nursing and medical officers), industry awards (including aged care) and a hybrid award covering health (the health professionals and support services award). Ultimately, the *Nurses Award* as an occupational award applies to nurses employed in the aged care sector and the *Aged Care Award* applies to other employees the residential aged care industry.
23. The social and community services sectors covered by the *SCHDS Award* were dealt with by a different panel in Stage 4 of Award Modernisation. A single award covering the social, community, homecare and disability service sectors was created. Following applications by aged care employers, the award was varied to cover home care employees working in the aged care sector.

#### The modernisation of the Aged Care Award

24. Before Award Modernisation, there were a variety of part-time employment provisions in the precursor awards to the *Aged Care Award*. It is apparent that the Commission did not make its decision regarding the part-time employment provisions on the basis of the balance of regulation.
25. In making the *Aged Care Award*, the Commission expressly rejected part-time employment arrangements like those proposed by the employers.<sup>10</sup> Instead, they created a clause which balanced the need to protect the part-time employee without preventing an employer from offering additional hours of work. The Full Bench noted that they held reservations regarding

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<sup>9</sup> *Award Modernisation* [2008] AIRCFB 708.

<sup>10</sup> *Re Award Modernisation* [2009] AIRCFB 345, [147]-[149].

the nature of consent where a supervisor requests an employee to work additional hours. The Full Bench said (at [148]):

*We have some reservations about the nature of the consent in circumstances where a supervisor directly requests a change in hours on a day where the part-timer had otherwise planned to cease work at a particular time. Existing provisions require that any amendment to the roster be in writing and we have retained this provision. We also have no doubt that many part-time employees would welcome the opportunity to earn additional income. **However, there may also be part-timers who would be concerned to ensure that their employment is not jeopardised by declining a direct request from a supervisor to work additional non-rostered hours at ordinary rates.** From the submissions of the employers this is a major cost saving and used widely.*

26. When the *Aged Care Award* was made, it contained the following part-time employment clause:

**10.3 Part-time employees**

*(a) A part-time employee is an employee who is engaged to work less than fulltime hours of an average of 38 hours per week and has reasonably predictable hours of work.*

*(b) 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.*

*(c) The terms of the agreement may be varied by agreement and recorded in writing.*

*(d) The terms of this award will apply on a pro rata basis to part-time employees on the basis that the ordinary weekly hours for full-time employees are 38.*

*(e) Payment in respect of personal/carer's leave (where an employee has accumulated an entitlement) for a part-time employee will be on a pro rata basis made according to the number of hours the employee would have worked on the day or days on which the leave was taken so as not to reduce the employee's wage below that level which the employee would have received had the employee not been absent.*

27. On 26 August 2009, the *Award Modernisation Request* was amended by the Minister for Employment and Workplace Relations. This directed the Commission to ensure that the hours of work and associated overtime did not operate to discourage employers from offering additional hours of work to part-time employees or employing part-time employees rather than casual employees.<sup>11</sup>

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<sup>11</sup> *Variation to Award Modernisation Request*, [26 August 2009].

28. To clarify that alterations to the agreed pattern of work can be made on a one off basis as well as on a more permanent basis, the Full Bench varied clause 10.3 (c) of the *Aged Care Award* to read:<sup>12</sup>

*(c) Any agreed variation to the hours of work will be in writing.*

#### The modernisation of the *SCHDS Award*

29. Before Award Modernisation, there were a variety of part-time employment provisions in the precursor awards to the *SCHDS Award*.
30. The part-time employment provision does not appear to have been a substantive issue in these proceedings. When the *SCHDS Award* was made in 2010, it included the following clause:

##### ***10.3 Part-time employment***

*(a) A part-time employee is one who is engaged to work less than 38 hours per week or an average of less than 38 hours per week and who has reasonably predictable hours of work.*

*(b) The terms of this award will apply to part-time employees on a pro rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.*

31. No reasons were given for the omission of a requirement to agree to a regular pattern of work, including the number of hours, the days on which work will be performed and the starting and finishing times each.

#### ***Transitional Review of Modern Awards***

##### Review of the *Aged Care Award*

32. In the Transitional Review, Aged and Community Care Services of NSW & ACT and others applied to vary the *Aged Care Award* so that the part-time employee's ordinary hours of work could be set by the roster. These claims were rejected by the Commission.
33. This claim was rejected by Deputy President Gooley.<sup>13</sup> Noting the reservations of the Award Modernisation Full Bench, she found that the current award provision provided that the current part-time provisions protected employees without discouraging employers from offering them additional hours:<sup>14</sup>

*[20] When making the awards, the award modernisation Full Bench understood that it was the practice in many health facilities that part-time employees agreed to work additional hours at ordinary time. Whilst the award modernisation Full Bench expressed some reservations about this practice, the Minister's consolidated request*

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<sup>12</sup> *Aged Care Award 2010* [2010] FWAFB 2026 [67].

<sup>13</sup> *Aged Care Award* [2013] FWC 5696.

<sup>14</sup> [2013] FWC 5696, [16]-[23].

*made it clear that modern awards should not operate to discourage employers from offering additional hours to part-time employees. While ensuring the Award complied with the consolidated request, the award modernisation Full Bench maintained certain protections for part-time employees.*

*[21] The Award provides part-time employees with certainty of hours but provides that part-time employees can agree to work additional hours without the payment of overtime. However if part-time employees are directed to work outside of their agreed hours then they are paid overtime. This proposal would see their hours varied without their agreement. It would make the protections provided by clause 10 otiose.*

*[22] I am not persuaded to make the variations sought concerning part-time employees hours of work. The provisions in the Award are not unique and appear in many modern awards.*

34. The decision of the Deputy President was appealed by Leading Aged Services. The appeal was dismissed.<sup>15</sup> The Full Bench found that allowing an employer to set the employee's ordinary hours of work by a roster 'would not constitute predictability in employment in any real sense'.<sup>16</sup> The result of the applicant's variations would leave the requirement for reasonably predictable hours of work without substance.<sup>17</sup>

#### Review of the SCHDS Award

35. During the Transitional Review of Modern Awards, the ASU, supported by United Voice and the Health Services Union, sought a variation to the award to require an employer to agree to a regular pattern of work with the employee.
36. VP Watson found that an agreed regular pattern of work was a standard award entitlement that would impose little administrative burden on employers. Vice President Watson stated (at [20]):<sup>18</sup>

*That part of the application seeking a requirement that part-time arrangements be agreed in writing prior to commencing employment is a common award provision. It requires employees to be given clear information as to the basis of their employment when they are engaged. I consider that the case for such a clause is strong, especially when there is no award minimum engagement period. In my view the concerns of the employers can be allayed by standard procedures that comply with the clause, such as those that have been developed for employers covered by similar provisions in other awards. I will make this change prospective to allow employers to prepare for the*

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<sup>15</sup> *Leading Aged Services Australia NSW-ACT* [2014] FWCFB 129 ('*Leading Aged Services*'), [16].

<sup>16</sup> *Leading Aged Services*, [27].

<sup>17</sup> *Leading Aged Services*, [27].

<sup>18</sup> *Australian Municipal, Administrative, Clerical and Services Union* [2013] FWC 4141.



*change. If significant practical problems emerge an appropriate variation can be sought. I will insert the clause sought by the ASU with effect from 1 August 2013.*

37. Consequently, the current *SCHDS Award* part-time employment (cl 10.3 (c)) was inserted in 2013.<sup>19</sup>

#### **IV – Reasonable predictability and the contractual guarantee of a pattern of work**

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38. ABI asserts that there is a ‘tension’ between the definition of a part-time employee as having ‘reasonably predictable hours of work’ and the requirement to agree, before commencing employment, to a regular pattern of work including the number of hours to be worked each week, the days of the week on which work will be performed and the start and finishing times each day (‘the contractual guarantee’). It is submitted that the provision for a part-time employee to have ‘reasonably predictable hours of work’ is made otiose by fixing the regular pattern of work contractually. ABI submits that the notion of fixing a pattern of work by agreement removes the concept of ‘reasonableness’ from reasonable predictability.<sup>20</sup>
39. This is a simplistic argument relying on an obtuse interpretation of the relevant provisions without regard for the actual history of the provisions.
- a. Firstly, the part-time provisions of the *Aged Care* and *SCHDS Awards* are not as rigid as asserted by the employers. They do not provide a pattern of work that is permanently fixed and invariable. The regular pattern of work can be varied at any time by agreement with the employee. This can either be either an occasional variation or on an ongoing basis.
  - b. Secondly, the agreement of a regular pattern of work is actually the foundation for the reasonable predictability of working hours. If the hours of work could be set unilaterally by the employer, then the predictability of the hours of work would be diminished. These propositions are supported by the history of the current part-time employment provisions.
  - c. Thirdly, the employers rely on an unnecessarily blunt definition of ‘reasonably predictable’ that is contrary to normal principles of award interpretation.

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<sup>19</sup> *Australian Municipal, Administrative, Clerical and Services Union* [2013] FWC 4141, [20].

<sup>20</sup> See the Submission of ABI, dated 30 September 2016, [4.4]-[4.10]; Submission of Jobs Australia, dated 30 September 2016,

40. ABI's definition is contrary to established principles of award interpretation:<sup>21</sup> it is trite and pedantic, ignores the meaning intended by its original framers and does not give effect to the evident purpose of the provision.
41. The meaning of 'reasonable predictability' in the identical part-time provisions of the *Aged Care Award* (cl 10.3) and the *SCHDS Award* (cl 10.3) has been tested several times. Most recently, in *Leading Age Services*, a Full Bench found that there was no contradiction between the requirement 'reasonably predictable hours of work' and the requirement to agree a regular pattern of work, including hours of work, days of work and the starting and finishing times each day.
42. The Full Bench noted that the purpose of part-time work provisions was to create a category of employment to attract people who would not be attracted to casual or full-time employment because of their other commitments. The provisions were designed to provide reasonable predictability of hours of work to those employees with outside commitments, without preventing them from working additional hours if necessary.<sup>22</sup> The Full Bench said (at paragraph 19):
- This requirement for reasonable predictability in hours of work stems, we consider, from the originating concept of part-time employment as being suitable for and attractive to persons who have other significant and reasonably predictable family, employment and/or educational commitments and therefore require some certainty as to the days upon which they work and the times they start and finish work.* (emphasis added)
43. Thus, the starting point for reasonable predictability is the agreement between employer and employee of a regular pattern of work.<sup>23</sup> From the agreed starting point, the hours of work can be varied under clause 10.3 (c), but this agreement must be recorded in writing. An agreement reached under clause 10.3 (c) can include variations to the number of hours that are worked each week, the days the employee works and starting and finishing times on each day.<sup>24</sup> Where the employer is simply offering additional hours of work, they are even relieved of the obligations of the rostering clause.
44. This reasoning also applies to the part-time provisions of the *SCHDS Award* which are identical to the *Aged Care Award* provision. This clause is a direct product of the reasoning of the AIRC

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<sup>21</sup> See *Ancor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 24, [2]; See also *Kucks v CSR Ltd* (1996) 66 IR 182, [184].

<sup>22</sup> *Leading Aged Services*, [15]-[16].

<sup>23</sup> *Leading Aged Services*, [20].

<sup>24</sup> *Leading Aged Services*, [21].

Full Bench in the Health and welfare services (excluding social and community services) group at Award Modernisation. We also note that the *SCHDS Award* offers further flexibility to the employer in the home care sector through the client cancellation clause (cl 25.5 (f)).

***Lay evidence called by the Unions regarding the flexibility of part-time employees***

45. The lay evidence called by the Unions demonstrates that the care awards already provide for a great deal of flexibility. Further, part-time employees in the care sector are very flexible and are willing to renegotiate their hours of work when asked to by their employer, if those requests are reasonable and fit the employee's outside work commitments. Where there is a conflict between the employer's request and the employee's needs, the contractual guarantee of a regular pattern of work offers the employee the security to negotiate with their employer.
46. Elizabeth Nicholls is employed as a disability support worker under the *SHCDS Award* by Care Options Inc at Mandurah in Western Australia. She provides support to people who attend her employer's day centre program. Elizabeth Nicholls gave evidence that she is generally willing to accept requests to work additional hours or vary her regular pattern of work if it fits with her caring and other responsibilities. Ms Nicholls has agreed to change her regular pattern of work on at least two occasions since she started working for her employer in 2014.<sup>25</sup> She also gave evidence that she works additional shifts when she is asked to by her employer.<sup>26</sup> Ms Nicholls was not cross-examined on this evidence.
47. Veronica Keane is employed as a home care worker under the *SCHDS Award* by Catholic Care in Liverpool, New South Wales.<sup>27</sup> She provides personal care, social support, transport and domestic help to aged and disabled people living in their homes. Ms Keane's hours of work are set by her contract.<sup>28</sup> Her agreed hours of work are Monday, Tuesday and Wednesday. She is contracted to work 10 hours each week but she usually works closer to 20 hours each week.<sup>29</sup> Her hours can also be changed in the case of client cancellation under clause 25.5 (f) of the *SCHDS Award*.<sup>30</sup> Until she had the financial security of the part-pension, she accepted additional hours whenever she was offered them by her employer.<sup>31</sup>
48. Ms Keane also works her hours in broken shifts, with a number of small engagements spread over a day. Her evidence is that she can be paid to work 5 hours spread over a twelve hour

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<sup>25</sup> See statement of Elizabeth Nicholls tendered and marked as Exhibit #262 on 15 July 2016, ('*Nicholls Statement*'), [22].

<sup>26</sup> *Nicholls Statement*, [17], [26].

<sup>27</sup> See statement of Veronica Keane tendered and marked as Exhibit #258 on 15 July 2016, ('*Keane Statement*'), [9]-[10].

<sup>28</sup> *Keane Statement*, [14].

<sup>29</sup> *Keane Statement*, [15]; PN6173-PN6177.

<sup>30</sup> *Keane Statement*, [16a]; PN6165.

<sup>31</sup> *Keane Statement*, [16b].

period.<sup>32</sup> Veronica Keane's evidence is that the level of flexibility provided for by the *SCHDS Award* is such that she 'already feel[s] like a casual employee'.<sup>33</sup>

49. Mary Hajistassi gave evidence regarding part-time employees and roster change scenarios in the residential aged care sector.<sup>34</sup> In her experience as an organiser in the residential aged care industry, the importance of a contractually agreed regular pattern of work, including days of work and starting and finishing times is that it protects a part-time employee from a unilateral variation of their hours.<sup>35</sup> Part-time employees are willing to be flexible about their hours of work. For the most part, employees are happy to accommodate the employer's requests for change if they do not impinge on their commitments outside of work.<sup>36</sup> The contractual guarantee of a regular pattern of work gave the employee bargaining power that they would not otherwise have, which permitted them to negotiate a fair outcome in cases of roster change.<sup>37</sup>
50. Mary Hajistassi was not cross-examined on her evidence above (or at all).
51. Scott Quinn is employed as a disability support worker under an enterprise agreement (Community Based Support Enterprise Agreement 2014) which has been assessed against the Social, Community, Home Care and Disability Services Award 2010 for the purposes of the Better off overall test.
52. Scott Quinn is employed as a part-time employee on a guaranteed 60 hours per fortnight<sup>38</sup> but works an average of 37-40 hours per week. He gave evidence that he receives his roster on his phone, his roster can be checked up to 6 days in advance, but that his roster can be varied literally hour to hour<sup>39</sup> by text message to his phone. Such variations may change his hours, days and times of work. He also gave evidence about the spread of hours he might be required to work. Mr Quinn also gave evidence on the impact the variations and spread of hours has on his personal life.<sup>40</sup>
53. Scott Quinn and his co-workers are not just prepared to be extremely flexible, they have negotiated an agreement, using the current part-time entitlements as a base, which involves ultimate flexibility to the point where his work/ life balance suffers.

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<sup>32</sup> *Keane Statement*, [17].

<sup>33</sup> *Keane Statement*, [33].

<sup>34</sup> See statement of Mary Hajistassi tendered and marked as Exhibit #248 on 15 July 2016, ('*Hajistassi Statement*').

<sup>35</sup> *Ibid*, [16].

<sup>36</sup> *Hajistassi Statement*, [14]-[15].

<sup>37</sup> *Hajistassi Statement*, [9].

<sup>38</sup> Quinn evidence PN1666; Statement of Scott Quinn tendered and marked as Exhibit #11 on 15 March 2016 ('*Quinn Statement*') [15]

<sup>39</sup> PN1684-1690; [20]-[32] and annexures A and B

<sup>40</sup> *Quinn Statement* [27]-[29] and PN 1731-1733

## V – Regular part-time employment

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54. The current part-time employment provisions provide a stable and predictable pattern of work for part-time workers. To weaken these protections would mean that part-time employment under the care award would lose the ‘the essential integrity of part-time employment’.<sup>41</sup> At Award Modernisation, the Full Bench held that part-time employment ‘should be akin to full time employment in all respects except that the average weekly ordinary hours are fewer than 38’.<sup>42</sup>
55. The reason why part-time work exists is because there is a large section of the workforce who, because of a range of responsibilities such as caring or studying, cannot work full time. These workers often have commitments which prevent them from altering their part-time hours of work from week to week. The employer’s proposals discriminate against these workers, which will have significant consequences for the both the industry and the workforce.
56. There is clear evidence before the Commission that the highly variable type of employment proposed by the employer parties would have significant negative social, psychological and physical impacts on part-time employees. Workers in the industry already experience many of the harms associated with part-time employment. However, the burden of unpredictability is partially ameliorated by the fact that the part-time employment provisions offer employees some control over their working hours.
57. The lay evidence called by the Unions suggests that the changes proposed by the employers may actually deter workforce participation by removing the element of reasonable predictability that attracts people with caring and other significant responsibilities to part-time work in the sector.

### *The evidence of Dr Olav Muurlink*

58. The Unions rely on the evidence of Dr Olav Muurlink to establish the following propositions:
- a. Unpredictable patterns of work have two overlapping types of impact on the health and wellbeing of a worker: structural challenges, which relate to access to services and a worker’s ability to engage in health activities; and physical or psychological challenges.<sup>43</sup>
  - b. Unpredictable working hours are associated with ‘closing windows’ of socialisation, self-care and other positive behaviours associated with better physical and

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<sup>41</sup> [2008] AIRCFB 1000, [291].

<sup>42</sup> [2008] AIRCFB 1000, [291].

<sup>43</sup> *Muurlink Report, Figure 1: Overview of the challenges posed by unpredictable or less predictable work schedules*, p 5,

psychological health outcomes. Further, unpredictable working hours are associated with activities, such as smoking and alcohol consumption, with negative effects on a workers health and well-being. Unpredictable working hours also interfere with a person's ability to access services, such as medical services or gyms, that are associated with better health outcomes.

- c. A worker's level of control over working hours will have significant impacts on the worker's health. Low levels of control are associated with a broad range of negative health impacts, while higher levels of control may help ameliorate the stresses of work. Unpredictable working hours reduce a worker's sense of control. Similarly, unpredictable patterns of work interfere with the rhythms of life and increase a worker's sense of change. These factors interfere with a worker's capacity to deal with stress and are associated with poor health and wellbeing.
- d. The negative effects of unpredictable work cannot be fully off-set or mitigated by reshuffling activities or spending money on goods and services that could replace lost time.

59. ABI objected that Dr Muurlink's report was generic in nature and did not specifically analyse the industry covered by the SCHDS Award. This argument fails to grasp the concept that general principles have broad application. A human being is a human being, regardless of what industry they work in and there is no evidence that the consequences of unpredictable work are experienced differently according to the occupation of the worker. Further, when challenged on the inclusion of studies from other industries during cross-examination, Dr Muurlink agreed that there were studies that did not relate to the SCHDS Award industries but added 'that there's possibly a bit of a disproportionate focus on the health and care sector in the literature'.<sup>44</sup> On re-examination, Dr Muurlink noted that the studies in this sector disproportionately concern higher status workers such as doctors and nurses, but that the variables of unpredictability will be amplified amongst lower income workers.<sup>45</sup> Dr Muurlink's findings are supported by the lay evidence called by the Unions.

60. Dr Muurlink's emphasis on negative health and welfare effects of unpredictable work is relevant to the current proceedings, which deal with proposals to vary the care awards in such a way that would increase the variability of part-time hours while removing any formal control that workers have over the hours that they work. Dr Muurlink's evidence is relevant to the Commission's obligation to ensure that the modern awards provide a *fair and relevant* minimum safety net.

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<sup>44</sup> PN6370.

<sup>45</sup> PN6461.

61. As noted above at paragraphs 42 and 43, the purpose of part-time employment was to attract employees to the workforce who may otherwise be excluded because the irregularity of casual employment and the time-demands of full-time employment conflicted with their obligations. The disability and homecare workforces are dominated by women with caring responsibilities. The evidence of Dr Muurlink demonstrates the disabilities associated with the employers' proposed variations that are likely to make employment in the sector less attractive, at exactly the time when it needs to attract more workers.
62. Further, Dr Muurlink was not seriously challenged on the substance of his evidence. Dr Muurlink was cross-examined at length on the choice of studies cited in his report,<sup>46</sup> but his evidence has withstood cross-examination. ABI argues that Dr Muurlink tended to 'cherry pick' studies that support his thesis, while ignoring the better studies which did not support his contentions. However, ABI does not cite any study that should be preferred to the studies noted by Dr Muurlink in his report nor do they give any specific example of a study relied upon by Dr Muurlink that was lacking in any way.

#### Structural challenges associate with unpredictability

63. Dr Muurlink reported on a study by Costa et al (2006) about the impact of flexibility on health. Costa defined flexibility from the perspective of both the employer and the employee, using the term 'variability' to describe employer control over working hours and 'flexibility' to describe individual workers' discretion and autonomy to adjust working hours to reduce work life conflict and better accommodate other activities, needs and responsibilities.<sup>47</sup>
64. On the basis of this distinction Dr Muurlink found that while 'flexibility' can have a positive effect on a workers' sense of wellbeing, but because 'variability' (the employer-focused concept of 'flexibility') reduces employee control, 'variability' can have a negative impact on employee well-being.<sup>48</sup>
65. Unpredictability in the scheduling of work can interfere with an employee's ability to engage in healthy activities and behaviours. Dr Muurlink found that where work has a predictable 'beat' workers are better able to synchronise work with healthy behaviours such as family meals and team sports.<sup>49</sup> Where work schedules clash with other activities, Dr Muurlink reported that there was evidence of diminishing windows for socialisation and self-care.<sup>50</sup> Similarly, Dr Muurlink found that unpredictability may reduce a worker's ability to access services. This may mean that a worker cannot use a gym or find good quality food options. More seriously, this might

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<sup>46</sup> PN674-PN6447.

<sup>47</sup> *Muurlink Report*, p 4.

<sup>48</sup> *Muurlink Report*, p 4.

<sup>49</sup> *Muurlink Report*, p 5.

<sup>50</sup> *Muurlink Report*, p 5.

mean that a worker is unable to access to medical facilities.<sup>51</sup> Reconciling life events with work becomes inevitably more difficult when work becomes less predictable and regular.<sup>52</sup>

66. Dr Muurlink also reported that working unpredictable patterns was found to be associated with smoking and alcohol consumption, long term increases in body mass index and lack of exercise. Dr Muurlink reported that the unhealthy impacts of unpredictable working hours will also have secondary health consequences.<sup>53</sup>
67. Dr Muurlink reported that the structural problems associated with unpredictable hours of work appear to affect lower income workers more than higher income workers.<sup>54</sup> Higher income workers can 'buy back' time lost to work by purchasing other services. For instance, a higher income worker could maintain their leisure time by using replacing time spent of chores with money spent on a cleaner.<sup>55</sup> Workers who cannot afford to replace time with money will feel the effects of unpredictable and irregular working hours more than those workers who can.<sup>56</sup>

#### Physical and psychological impacts of unpredictable working hours

68. A sense of control is one of the most critical factors determining, both directly and indirectly, health responses to the stressors such as work conditions. Dr Muurlink's evidence is that a stronger sense of control is generally associated with better health and welfare outcomes.<sup>57</sup> In the workplace, control appears to have a direct impact of an employee's capacity to deal with stress. Dr Muurlink reports that work stress is commonly defined as a combination of work demand and work control. Control over working hours is highly associated with an overall sense the worker's control over their job.<sup>58</sup> Higher levels of job control ameliorate the impacts of work demand on human health. Lower levels of control are associated with negative health outcomes. Dr Muurlink found that 'these findings about control are so universal as to be almost considered a rule.'<sup>59</sup>
69. A reduced sense of control over the workplace is associated with negative impacts on health and wellbeing. Dr Muurlink found that high work demand without high job control (job strain) has been found to be associated with a number of negative physical and psychological health outcomes, including heart disease, dementia and depression. For instance, the well-regard Kopp study (Kopp, Skrabski, Szanto & Siegrist, 2006) demonstrated that work control is a powerful

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<sup>51</sup> *Muurlink Report*, p 6.

<sup>52</sup> *Muurlink Report*, p 17.

<sup>53</sup> *Muurlink Report*, p 5.

<sup>54</sup> *Muurlink Report*, p 5.

<sup>55</sup> *Muurlink Report*, p 5.

<sup>56</sup> *Muurlink Report*, p 6.

<sup>57</sup> *Muurlink Report*, p 6.

<sup>58</sup> *Muurlink Report*, p 7.

<sup>59</sup> *Muurlink Report*, p 9.



predictor of mortality from cardiovascular disease and ischaemic heart disease.<sup>60</sup> Dr Muurlink reported that a study of Australian nurses found that a perception of control over the work environment was associated with reduce work-life conflict and better psychological wellbeing.<sup>61</sup> Job strain has been associated with ‘cognitive and physical workload perceptions’. Further, Dr Muurlink reports that a sense of control has been strongly associated with absenteeism and intentions to leave the profession, which are considered markers of wellbeing.<sup>62</sup>

70. Dr Muurlink found further that there was evidence of positive impacts associated with giving employees greater control over working hours.<sup>63</sup> Working practices that give workers control over their hours, such as self-rostering, are associated with positive physical and psychological outcomes. Dr Muurlink found that the effect of control over working hours would be exacerbated for under-employed low income workers – being a ‘job taker’ rather than a ‘job chooser’ would mean a worker would feel the effects of reduce control more keenly.<sup>64</sup> Dr Muurlink described control as a ‘prophylactic’ for work related stress, protecting the worker from its impacts.<sup>65</sup> Indeed, lower income workers with a higher perception of control show health levels comparable to that of higher income workers.<sup>66</sup>

#### Change and arrhythmia

71. Dr Muurlink also reports that change and arrhythmic work patterns have a negative impact on health and wellbeing.<sup>67</sup> Even apparently minor changes will have an impact on health.<sup>68</sup> Dr Muurlink reported multiple studies have shown a relationship between flexible work practices and occupational injuries and illnesses.<sup>69</sup> Dr Muurlink particularly emphasised the negative impacts of ‘on-call’ and ‘standby’ work on health and wellbeing. This type of work appears to have a ‘domino impact’ on family and home life, with an emerging literature demonstrating its impacts on physical health.<sup>70</sup> The requirement to be alert and ready to work and the interference with sleep appear to be the most harmful element of on-call work.<sup>71</sup>

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<sup>60</sup> *Muurlink Report*, p 8.

<sup>61</sup> *Muurlink Report*, p 8.

<sup>62</sup> *Muurlink Report*, pp 8 and 9.

<sup>63</sup> *Muurlink Report*, p 8.

<sup>64</sup> PN6458.

<sup>65</sup> PN6457.

<sup>66</sup> *Muurlink Report*, p 8.

<sup>67</sup> *Muurlink Report*, pp 9-10.

<sup>68</sup> *Muurlink Report*, p 10.

<sup>69</sup> *Muurlink Report*, p 14.

<sup>70</sup> *Muurlink Report*, p 10.

<sup>71</sup> *Muurlink Report*, pp 10-13.

### *Lay evidence called by the Unions regarding part-time employment*

72. The lay evidence called by the Unions demonstrates that part-time employees seek part-time employment to ensure that they have certainty over their hours. Even so, the flexibilities in the Award ensure that they experience many of the disabilities associated with unpredictable work described by Dr Muurlink in his report.

#### Elizabeth Nicholls

73. Elizabeth Nicholls cares for her husband, who has severe medical issues. Ms Nicholls works part-time so that she can attend to his needs.<sup>72</sup> She has works a fortnightly roster fixed by contract. It is important that she has a regular pattern of work so that she can attend medical appointments. A regular pattern of work also allows Ms Nicholls to care for her daughter's two children.<sup>73</sup> Ms Nicholls gave evidence that she was worried that the variations proposed by the employers would make it more difficult to structure her caring responsibilities around her work. Ms Nicholls noted that appointments for medical specialists and hospital stays are usually made more than 7 days in advance.
74. Elizabeth Nicholls was not cross-examined on her evidence above (or at all).

#### Veronica Keane

75. Veronica Keane gave evidence that she chose to be a part-time employee to ensure that she has a regular income while still working less than full-time hours.<sup>74</sup> Ms Keane gave evidence she recently reduced her hours of work because of the stress caused by her irregular and unpredictable hours of work.<sup>75</sup> Ms Keane evidence is that she can be paid to work 5 hours spread over a twelve hour period.<sup>76</sup> Her working hours commence in the morning around 8.00 AM or 9.00 AM and work for an hour, after which she will have a break until 12.00 PM, followed by two one hour engagements in the afternoon and evening.<sup>77</sup> Ms Keane said:

*'It's hard for your body to adapt when your hours keep changing. I feel I need a pattern, where I can wake up and go to bed at the same times.'*<sup>78</sup>

76. Veronica Keane was able to reduce her hours because she became eligible to receive a pension.<sup>79</sup> If the variations were made, Ms Keane is likely to leave entirely because she would find the working conditions too stressful.<sup>80</sup>

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<sup>72</sup> Nicholls Statement, [4], [24]-[26].

<sup>73</sup> Nicholls Statement, [27].

<sup>74</sup> Keane Statement, [8], [19].

<sup>75</sup> Keane Statement, [22], [25], [28].

<sup>76</sup> Keane Statement, [17].

<sup>77</sup> PN6190-PN6217.

<sup>78</sup> Keane Statement, [26].

## Fran Howell

77. Fran Howell works forty-eight hours per fortnight at a disability service in Newcastle, NSW.
78. Ms Howell works part time so that she can plan and balance work and family commitments which include caring for grandchildren three days per fortnight while her daughters are at work, dropping her grandchildren to school<sup>81</sup> and taking her ageing parents-in-law to specialist appointments and other commitments.<sup>82</sup> Ms Howell gave evidence that if her agreed working hours were regularly varied, and she was not available to provide care for her grandchildren, this would have a detrimental financial impact upon her two daughters, one of whom is a single parent.<sup>83</sup>
79. Fran Howell was not cross-examined on her evidence above (or at all)

## **Heather Fairweather**

80. Heather Fairweather works 62 hours per week<sup>84</sup> at a disability service in Yass, New South Wales. Ms Fairweather would prefer to work full time but has structured her life around her part-time working hours given that full-time work is not provided by her employer.<sup>85</sup>
81. Ms Fairweather's working hours enable her to spend at least one day per week with her partner and at least one weekend a fortnight with her children, to plan and engage in school holiday activities with her children, to spend time with her ageing parents<sup>86</sup> and to plan and schedule trips to Sydney to visit her partner's family.<sup>87</sup>
82. Ms Fairweather expressed a number of concerns about the application, including the potential impact on her financial situation, the impact upon clients who need secure and stable supports and the possibility that disability support work will become less attractive to employees which will also be detrimental to clients.<sup>88</sup> In addition, although Ms Fairweather is generally available every day of the week<sup>89</sup>, it is important for her to have certainty about what days of the week she is working and when she will be starting and finishing so that she can be available to look after her children and maintain decent family relationships.

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<sup>79</sup> *Keane Statement*, [28], PN6183.

<sup>80</sup> *Keane Statement*, [35].

<sup>81</sup> *Howell Statement*, [9-11].

<sup>82</sup> *Howell Statement*, [13].

<sup>83</sup> *Howell Statement*, [12].

<sup>84</sup> PN5171.

<sup>85</sup> *Fairweather Statement*, [2] .

<sup>86</sup> PN5162.

<sup>87</sup> *Fairweather Statement*, [6]–[8].

<sup>88</sup> *Fairweather Statement*, [10]–[15].

<sup>89</sup> PN5199.

Rosie (Judith) Bookalil

83. Rosie (Judith) Bookalil works 31.5 hours per week for a disability service in Northern New South Wales. These hours enable Ms Bookalil to engage in community activities outside of work<sup>90</sup> and to provide consistent and quality supports to clients.<sup>91</sup>
84. The current part-time Award provisions have enabled Ms Bookalil and her employer to agree to vary Ms Bookalil's hours.<sup>92</sup>

Kevin Denny

85. Kevin Denny works 35 hours per week at a disability service in Yass, New South Wales.
86. Mr Denny's evidence is that clients do not have a propensity to cancel work from time to time and are not casual in changing their choice of support worker. Mr Denny's experience is that the relatively stable and secure nature of permanent part-time work means that there is an ability to develop and maintain professional relationships with clients based on mutual respect, which means understanding each other's needs.<sup>93</sup>

## **VI – Disability Care Sector**

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87. In its closing submissions, ABI argues that “rigid and inflexible regulations relating to part-time employment are frustrating attempts to halt the slide into casualization”<sup>94</sup>. The employer parties have provided no evidence to support this contention. Many of the assertions in the ABI Final Submissions refer to evidence which on a close reading of the transcript do support ABI's claims and in fact are a misrepresentation of this evidence. Examples of these are in the paragraphs 90 and 93 below.
88. At [4.8] of its final submissions, ABI claims that clause 10.3(c) binds an employer to a fixed, rigid working arrangement from which the employer cannot easily depart. This is incorrect as the provisions of the SCHADS Award provide significant flexibility in:
- a. enabling the employer and employee to agree to vary part-time hours;
  - b. providing for no minimum engagement period for part-time employees;
  - c. permitting broken shifts;

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<sup>90</sup> *Bookalil Statement* [10]-[11].

<sup>91</sup> *Bookalil Statement* [7]-[8]

<sup>92</sup> *Bookalil Statement* [6].

<sup>93</sup> *Denny Statement* [13].

<sup>94</sup> ABI final submissions [2.10]

- d. enabling the employer to request that the employee work additional hours which are paid at ordinary time until the employee works more than 10 hours per day or 38 hours per week or 79 per fortnight.<sup>95</sup>

89. Evidence filed by the employer parties confirms that:

- a. workers in the disability sector are committed to supporting people with disability;
- b. workers in the disability sector are prepared to change their working hours when possible to meet the needs of people with disability;
- c. workers in the disability sector are prepared to work additional hours when possible to meet the needs of people with disability.

90. This point is exemplified by the evidence of Hugh Packard discussed at paragraph 93. s

91. ABI makes a number of statements its final submissions which are not supported by any of the evidence called by the employer parties, namely:

- a. For many employers, when engaging new part-time employees, they are simply not able to specify the exact working hours of that employee to the level of specificity required by clause 10.3(c). [4.3 of the ABI Final Submissions].
- b. Since the introduction of clause 10.3(c) into the SCHDS Award on 1 August 2013, employers have grappled with how to continue employing part-time employees on reasonably predictable hours, without necessarily fixing the employee's hours of work, whilst also complying with clause 10.3(c). [4.11 of the ABI Final Submissions].
- c. One practice which has emerged is for employers to offer employees only those hours which they know with certainty will be worked in shifts that will be fixed and then regularly offer employees additional hours with the result that employers offer a lower number of guaranteed hours than employers know are available [4.12-4.13 of the ABI Final Submissions]. At [6.13], ABI cites evidence which it alleges supports this submission but the transcript references do no more than:
  - i. confirm the part-time hours that two employers currently offer their staff and
  - ii. confirm the concerns that PWDA CEO Matthew Bowden has about the ABI application.

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<sup>95</sup> Clause 28.1(b) of the *SCHDS* Award.

- d. The employer witnesses were unable to point to any example where the current Award provisions did not accommodate changing circumstances of people with disability who receive supports from workers employed under the Award.
92. The employer parties did not, as claimed, file a “comprehensive evidentiary case in support of the ABI application [6.1 of the ABI Final Submissions]. The employer parties called evidence from just four disability sector employers, namely Mei-Wel Limited, Valmar Support Services Ltd, ConnectAbility Australia and Scope (Aust) Ltd, despite the fact that thousands of employers and tens of thousands of employees will be affected by the proposed amendments to the part-time provisions. In NSW alone, there are currently almost 5,000 providers registered with the National Disability Insurance Authority. ABI was critical of the Unions for not filing any evidence from non-residential support workers who work in lifestyle and leisure programs or day programs. ([6.16] of the ABI Final Submissions)). This criticism is misguided as many people with disability who live in supported residential accommodation will have lifestyle and leisure activities as part of their plan and may wish to have the worker who supports them to get ready in the morning to also support them during the day’s activities. In any event, all of the disability support workers who gave evidence in the proceedings are directly affected by the proposed changes.
93. ABI amended its application after the Unions filed their evidence and claims that a number of the union witnesses will not be affected by the proposed changes. ([6.18(b)] of the ABI Final Submissions)). The Unions are concerned that the drafting of the amended Application may not reflect the intentions of the Employer parties in this regard and that its application may be wider than anticipated.
94. ABI claims that clause 10.3(c) of the SCHCDSI Award is a disincentive to engaging employees on a part-time basis. It cites as support for this submission the evidence of Hugh Packard<sup>96</sup> in relation to a situation where a part-time worker took a client to a social function which ended later than the worker’s usual finishing time of 8pm. To accommodate the client’s desire to stay at the function, the worker agreed to work additional hours. Mr Packard’s evidence in this regard demonstrates that the current provisions are working; in fact Mr Packard said that most workers faced with a similar situation would agree to work additional hours<sup>97</sup>. Mr Packard’s evidence does not establish that the current part-time provisions are operating as a disincentive to engaging employees on a part-time basis.

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<sup>96</sup> PN5597.

<sup>97</sup> PN5606.

95. ABI claims that its Amended Draft Application retains sufficient protection for employees ([5.3] of the Final ABI Submissions). There was no evidence from employers in relation to the impact of the proposed changes on the current workforce.
96. There was no evidence from employers as to whether they will be able to attract a quality, skilled workforce who is willing to work flexible part time hours as provided for in the amended application.

## **VII – Home Care Sector**

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97. Home care is the provision of ‘personal care, domestic assistance or home maintenance to an aged person or a person with a disability in a private residence’.<sup>98</sup> The home care sector is covered by the *SCHDS Award*.

### ***The employer’s applications***

98. St Ives have proposed variations to the part-time provisions of the *SCHDS Award* citing difficulties with rostering a part-time workforce who provided individualised in-home care to aged persons under the CDC home care scheme. It is important to note that the introduction of CDC is a significant change to the way the sector is funded, but it is not a change to the type of service provided. Home care has, and will always be, the provision of in-home personal care and domestic assistance.
99. Further, St Ives has not provided any evidence that its difficulties are experienced by anyone else in the sector. We note that no aged care industry peak body has made an application to vary part-time provisions of the *SCHDS Award*. Indeed, there is no evidence before the Commission that the problems cited by St Ives are experienced in the industry generally. The appropriate avenue for an individual employer (particularly a large employer like St Ives)<sup>99</sup> to address its concerns is through enterprise bargaining.
100. The ABI application would also affect the conditions of part-time home care employees but they have filed no evidence or submissions regarding the home care sector.

### ***The evidence called by St Ives***

101. St Ives called two witnesses in support of its application, Lois Andrijich and Leah Miles. Neither witness gave any evidence relevant to the *SCHDS Award* part time provisions. Neither of these witnesses was able to give any evidence regarding the wider home care sector.

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<sup>98</sup> *SCHDS Award*, cl 2.

<sup>99</sup> See statement of Lois Andrijich tendered and marked as Exhibit 235 on 14 July 2016, (‘*First Andrijich Statement*’), [5]. St Ives’ employees 500 people in the home care sector.

102. Leah Miles is employed by St Ives as an Administration Assistant with responsibility for providing support and training to the employees who set the rosters of workers employed under the *SCHD Award*.<sup>100</sup>
103. In her statement, Ms Miles gave evidence that St Ives' main difficulty was matching staff availability and skill set with client requirements. Ms Miles gave evidence that staff could alter their hours of work with two weeks' notice.<sup>101</sup> On cross examination, Ms Miles gave evidence that part-time employees at St Ives were employed under a non-award arrangement where they were able to unilaterally set their hours of work through their 'availability'.<sup>102</sup> Any problems that St Ives has with accommodating client needs within an employee's availability to work derives from their choice to allow employees the latitude to set their availability to work.
104. The issues identified by Ms Miles do not relate to the Award and are not relevant to these proceedings. Moreover, Ms Miles gave no evidence of any change in the wider industry since the introduction of CDC.
105. Lois Andrijich is the St Ives General Manager Human Resources (Operations).<sup>103</sup> Ms Andrijich confirmed that St Ives operated a system where staff could unilaterally set their hours of work according to their availability.<sup>104</sup> Ms Andrijich acknowledged that this was not a *SHCDS Award* obligation, but noted that they consider it important to offer employees flexibility to work around their caring responsibilities or caring commitments.<sup>105</sup> The rostering issues identified by Ms Andrijich are therefore not caused by the *SCHDS Award* part-time provisions but by St Ives' particular employment practices.
106. Ms Andrijich gave evidence regarding CDC. Ms Andrijich described the CDC as a system where a home care consumer is able to change services and care workers at unilaterally. This is contradicted by the evidence called by the Unions described below.<sup>106</sup> It appears St Ives may, as a matter of policy, extend unilateral decision-making powers to its employees and clients.
107. Neither witness called by St Ives gave any evidence that St Ives was planning to change its employment practices.
108. St Ives has filed no other evidence to support its application.

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<sup>100</sup> See statement of Leah Miles tendered and marked as Exhibit #234 on 14 July 2016 ('*Miles Statement*').

<sup>101</sup> *Miles Statement*, [5]-[6].

<sup>102</sup> PN5003-PN5015.

<sup>103</sup> *First Andrijich Statement*; See also statement of Lois Andrijich tendered and marked as Exhibit 236 on 14 July 2016, ('*Second Andrijich Statement*').

<sup>104</sup> PN5054-PN5055.

<sup>105</sup> PN5055-PN5056.

<sup>106</sup> *First Andrijich Statement*, [21]-[27].



### *Individual direction of care in the home care sector*

109. The only probative evidence regarding CDC before the Commission was filed by the Unions. The witness statement of Melissa Coad describes the wider regulatory and funding arrangements for the aged care industry and changes in the industry.<sup>107</sup>
110. Home care is funded by the federal government through the Federal Home Care Packages Programme ('FHCPP'). CDC and individualised funding were introduced in August 2013 to replace a number of federal funding packages for in-home aged care.<sup>108</sup> It is now the predominant model for funding the provision of in-home aged care. On 1 July 2014, approximately 59,000 existing FHCPP packages were converted to the CDC funding model.<sup>109</sup> Federal funding is supplemented by an 'income tested fee' paid by the consumer.<sup>110</sup> The *Home Care Packages Program Operational Manual* provides practical advice for the provision of home care services.<sup>111</sup>
111. The purpose of CDC is to deliver greater flexibility and choice to home care clients, who will now be able to choose the types of care and services that they want. This will include the method of service delivery. The key reform is to hold providers accountable to the individual by clearly identifying the sum of money available to individual and how that money is spent through individualised budgets.<sup>112</sup> This is achieved through an individualised monthly budget.<sup>113</sup>
112. Home care packages provide for the care and services identified in their home care plan.<sup>114</sup> This plan must be developed to account for the consumer's wishes, but a home care provider may decline to provide a service if they choose.<sup>115</sup> Providers are also responsible for the monitoring and review of the consumer's package on a regular basis. While the consumer is able to take an active role in the management of their plan, they are not expected to play the role of case manager.<sup>116</sup>
113. A consumers rights in CDC are provided by the *User Rights Principles 2014 (Cth)* ('*User's Rights Principles*'), regulations made under the *Aged Care Act 1997 (Cth)* ('*Aged Care Act*'). Providers are obliged to comply with these principles under s 56-2 (J) of the *Aged Care Act*.

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<sup>107</sup> Coad Statement.

<sup>108</sup> Coad Statement, [9].

<sup>109</sup> Coad Statement, [10]-[11].

<sup>110</sup> Coad Statement, [11].

<sup>111</sup> See *Home Care Packages Program Operational Manual* tendered and marked as Exhibit #264 on 15 July 2016 ('*Operational Manual*').

<sup>112</sup> Coad Statement, [12]-[12].

<sup>113</sup> *Operational Manual*, p 31-32.

<sup>114</sup> *Operational Manual*, p 32.

<sup>115</sup> *Operational Manual*, p 33.

<sup>116</sup> *Operational Manual*, p 36.

The rights and responsibilities of home care consumer's rights are described by Schedule 2 of the *User's Rights Principles*.

114. Contrary to St Ives assertions, consumers have rights to flexibility and choice under the *User's Rights Principles* but this is not a unilateral right or absolute discretion to set the terms of their care.<sup>117</sup> Instead, the *Users Rights Principles* balance the rights of a consumer to flexibility and choice with their obligation to accept responsibility for their choices, negotiate any changes to their service and provide reasonable notice if they do not require home care on a particular day.<sup>118</sup>
115. CDC provides incentives for employers to increase the predictability and consistency of service delivery. The services provided by home care employees include domestic assistance cleaning, cooking and transport. Home care workers also provide low acuity personal care such as showering and dressing and the management of eating, incontinence and medication. Continuity and predictability of service is an important element of quality of service,<sup>119</sup> Clients of home care are often vulnerable and socially isolated – continuing relationships with the home care employee are considered highly desirable. Good relationships between home care workers and clients considered valuable.<sup>120</sup>
116. There is no probative evidence before the Commission that the introduction of CDC has led to any changes in patterns of employment in the industry.

***Additional flexibilities that apply to home care employees***

117. The provisions of the *SCHDS Award* which relate to home care employees are already very flexible. In addition to the general entitlement to voluntarily work additional hours without the payment of overtime, home care workers are subject to clause 25.5 (f) which deals with client cancellation. Clause 25.5 (f) provides:

***(f) Client cancellation***

*(i) Where a client cancels or changes the rostered home care service, an employee will be provided with notice of a change in roster by 5.00 pm the day prior and in such circumstances no payment will be made to the employee. If a full-time or part-time employee does not receive such notice, the employee*

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<sup>117</sup> *User's Rights Principles*, Sch 2, cl 1 (2)-(3).

<sup>118</sup> *User's Rights Principles*, Sch 2, cl 2.

<sup>119</sup> *Coad Statement*, [23]; *Keane Statement*, [11]-[12].

<sup>120</sup> *Coad Statement*, [21]; *Keane Statement*, [12].

*will be entitled to receive payment for their minimum specified hours on that day.*

*(ii) The employer may direct the employee to make-up time equivalent to the cancelled time, in that or the subsequent fortnightly period. This time may be made up working with other clients or in other areas of the employer's business providing the employee has the skill and competence to perform the work.*

118. The evidence of Ms Andrijich is that St Ives routinely uses this provision to cancel or reschedule an employee's regular hours of work.<sup>121</sup> There is no evidence to suggest that shift cancellations are a major cost to St Ives. Ms Andrijich gave evidence on the costs associated with shift cancellations, but did not provide anything to set those costs in the context of overall revenue or profit.<sup>122</sup> On cross examination Ms Andrijich admitted that this would have been possible.<sup>123</sup> Further, Ms Andrijich did not provide any evidence regarding the number of employees who could not be allocated make-up time. Without this further information, Ms Andrijich's evidence regarding the cost of client cancellations is meaningless.

#### ***Part-time employment in the home care sector***

119. The evidence called by the Unions demonstrates that employment in the home care sector is already so flexible that the regularity of part-time employment is undermined. This imposes significant financial, social, physical and psychological disabilities on the employee.
120. Veronica Keane has worked in the home care sector for nearly over 15 years.<sup>124</sup> Her experience has been that employment in the sector is highly unpredictable and variable. Ms Keane's evidence is that her hours of work are regularly changed by her employer due to client cancellations and she is subsequently required to make-up time.<sup>125</sup> This interferes with her ability to access medical services, which has a significant impact on her well-being because she is aging and her employment is physically demanding.<sup>126</sup> She also experiences difficulty socialising and spending time with her family.<sup>127</sup> Veronica Keane experiences a number of physical and psychological burdens as a consequence of the level of variability provided for by

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<sup>121</sup> *First Andrijich Statement*, [33].

<sup>122</sup> *First Andrijich Statement*, [44].

<sup>123</sup> PN5071-PN5076.

<sup>124</sup> *Keane Statement*, [9].

<sup>125</sup> *Keane Statement*, [23]-[25].

<sup>126</sup> *Keane Statement*, [23]-[13].

<sup>127</sup> *Keane Statement*, [21], [24].

the *SCHDS Award*.<sup>128</sup> Being a low income employee, she is unable to ameliorate these problems through the expenditure of money.<sup>129</sup>

121. Veronica Keane's experiences accord with the evidence given by Dr Muurlink on the structural, physical and psychological burdens associated unpredictable hours of work discussed at paragraphs 51 to 72 above.

### **VIII – Aged Care Award claims**

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122. St Ives has not filed any probative evidence to support its claims *Aged Care Award*. St Ives has also failed to support its claim in relation to the *Aged Care Award* with any substantive submission. The St Ives claim must fail.
123. Further, we note that no aged care industry peak body has made an application to vary part-time provisions of the *Aged Care Award*. There is no evidence before the Commission that the problems cited by St Ives are experienced in the industry generally. The appropriate venue for an individual employer (particularly a large employer like St Ives) is through bargaining.

#### ***The evidence called by St Ives***

124. St Ives called two witnesses in support of its application, Lois Andrijich and Leah Miles. Neither witness gave any evidence relevant to the *Aged Care Award*. On cross-examination Ms Miles admitted that all the staff referred to in her statement were home care workers, who are covered by the *SCHD Award*.<sup>130</sup> Similarly, on cross-examination Ms Andrijich admitted that her statement was not relevant to the residential aged care industry and in fact St Ives no longer operated a residential care business.<sup>131</sup>
125. St Ives has filed no other evidence to support its application.

#### ***The evidence called by United Voice***

126. The evidence of Mel Coad is that CDC has not been implemented in the residential aged care industry.<sup>132</sup> There is no evidence that CDC will be implemented in residential aged care any time in the future.<sup>133</sup>
127. The evidence of Mary Hajistassi was that employment patterns in the industry are largely driven by occupancy and changes in roster are relatively rare. Where changes are necessary, the

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<sup>128</sup> Keane Statement, [9], [22], [25]; See *passim* the Muurlink Report.

<sup>129</sup> Keane Statement, [29].

<sup>130</sup> PN4991-PN4997.

<sup>131</sup> PN5028.

<sup>132</sup> Coad Statement, [26].

<sup>133</sup> *Ibid*.

*Aged Care Award* provides for a fair and relatively straightforward process to consult with employees about changes to the roster. Part-time employees are protected from unilateral changes to their hours of work by their agreed regular pattern of work. They are therefore in a position to negotiate with their employer and reach a compromise.<sup>134</sup>

### ***Conclusion***

128. The current part-time work provisions of the *Aged Care Award* are an important protection for part-time employees and employees. It is fair and relevant to the existing conditions in the industry. This issue was contested in previous modern award proceedings and St Ives' has advanced no cogent reasons to depart from previous decisions.
129. The part-time provisions of the *Aged Care Award* have been reviewed alongside the *SCHDS Award*. If the Commission is minded to make a variation to the *SCHDS Award*, it should not do so in the *Aged Care Award*. Section 156(5) provides that in a review each modern award is reviewed 'in its own right'. While nothing in the FW Act prevents the Commission from reviewing two or more modern awards concurrently,<sup>135</sup> the Commission should review the award by reference to the particular terms and operation of that award, rather than make a global assessment based on generally applicable considerations.<sup>136</sup>

## **IX – Conclusion**

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130. In all the circumstances, the proposed amendments are not necessary to meet the modern awards objective and there is no proper basis for the Commission to exercise its discretion to vary the care award in the terms sought.
131. The Unions acknowledge the concerns raised by employers about the increasing rate of casualisation in the industry. However, simply citing the changes in the care sector due to the introduction of the NDIS and CDC is not sufficient to justify the Commission making the proposed variations. The employers have not demonstrated that the service provision and funding changes in the care sector provide a basis to depart from previous decisions of the Commission.
132. The current state of the care sector is uncertain and its future unpredictable. There is little probative evidence to support the contention that regulatory and funding changes have made part-time work impossible in the care sector. Diminishing the core requirements that provide predictability to part-time employees is not the appropriate response to casualisation.

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<sup>134</sup> *Hajistassi Statement*.

<sup>135</sup> *Jurisdictional Issues Decision*, [8].

<sup>136</sup> *National Retail Association v Fair Work Commission* [2014] FCAFC 118, [85].

133. Without any certainty of the nature of the change or its long term effects, the Commission cannot be satisfied that the introduction of the NDIS and CDC are cogent reasons to depart from its previous decisions or of the necessity of the variations to achieve the modern awards objective.
134. Further, not all employers and employees covered by the SCHDS Award and Nurses Award will be affected by either the NDIS or CDC. There is no evidence before the Commission concerning family day care employees; crisis accommodation services employees; most nurses; or social and community assistance employees (who do not work in the disability sector). For the proposed variations to meet the modern awards objective, the Applicants would need to demonstrate that the variations are apt for all the work covered by the SCHDS Award.
135. The part-time employment clauses in the care awards currently provide a ‘fair and relevant minimum safety net of terms and conditions’ and properly provide for a regular pattern of work for part-time employees. The variations proposed will simply make the employment conditions of a vulnerable workforce more irregular and precarious without actually addressing the problems cited by the employers.

**Australian Services Union**

**Health Services Union**

**United Voice**