BACKGROUND DOCUMENT

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards—Award stage—Group 4—*Social, Community, Home Care and Disability Services Industry Award 2010*—Substantive claims

(AM2018/26) MELBOURNE, 12 APRIL 2019

This is a background document only and does not purport to be a comprehensive discussion of the issues involved. It does not represent the view of the Commission on any issue.

1. Background

[1] A number of substantive claims have been made to vary the *Social, Community, Home Care and Disability Services Industry Award 2010* (the SCHADS Award) as part of the 4 yearly review of modern awards (the Review). In accordance with the Decision in [2018] FWCFB 1548,[1] a Full Bench has been constituted to deal with these substantive claims.

[2] A Mention before the President was held on 9 November 2018 to deal with the programming of a number of substantive claims to vary the SCHADS Award. Following the programming Mention a Report and Directions was published on 13 November 2018. Amended directions were issued on 4 February 2019.

[3] Prior to the 9 November Mention, parties were directed to file draft determinations outlining the substantive changes they were seeking to the SCHADS Award. Draft determinations were filed by:

- Health Services Union (HSU)
- United Voice
- Australian Services Union (ASU)
- Jobs Australia

[1] [2018] FWCFB 1548 at [41]

[4] At the Mention, parties provided further clarification as to the substantive claims they intended to pursue, and a final list of claims were attached to the Report. The list of claims is set out below (see 3.The Claims). These claims did not include claims that were the subject of a consent package reached between the parties during a conferencing process in 2017. The consent package is dealt with later in this document (see 2.The consent package).

[5] The following parties filed submissions and witness evidence in response to the 13 November directions (amended on 4 Feb):

- Australian Services Union[2]
- Health Services Union[3]
- United Voice[4]

[6] The HSU also filed an amended draft determination with their submissions.

[7] ABI also filed a draft determination and submissions[5] outlining additional claims they wish to pursue, following the collapse of the consent position (which is dealt with at chapter 2 of this document). The National Disability Service (NDS) filed a submission[6] outlining that it intends to make a submission related to the same claims that ABI have filed, but that it did not intend to file its own draft determination.

[8] The following parties filed submissions in reply:

- The Australian Industry Group (Ai Group)[7]
- Australian Business Industrial and NSW Business Chamber Ltd (ABI)[8]
- Australian Federation of Employers and Industry (AFEI)[9]
- National Disability Services (NDS)[10]
- Business SA[11]
- Jobs Australia[12]

[9] The matter is listed for hearing before a Full Bench on 15 – 17 April 2019.

[10] The submissions and submissions in reply that are the subject of the Full Bench hearings on 15 – 17 April 2019 are summarised in Chapter 4 of this document.

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[2] ASU submission, 18 February 2019

[3] HSU submission and amended draft determination, 15 February 2019.

[4] United Voice submission, 15 February 2019

[5] ABI submission and draft determination, 2 April 2019.

[6] NDS submission, 8 April 2019

[7] Ai Group submission in reply, 8 April 2019

[8] ABI submission in reply, 5 April 2019

[9] AFEI submission in reply, 8 April 2019

[10] NDS submission in reply, 8 April 2019

[11] Business SA submission in reply, 5 April 2019

[12] Jobs Australia submission in reply, 5 April 2019

2. Consent package

[11] Following a conciliation process in relation to the substantive claims (in 2017), interested parties reached a consent position which was outlined in a Joint Report.[13] Parties filed a consent draft determination and summarised a number of substantive claims that were withdrawn pursuant to the agreement. The parties continued to press a number of other substantive claims (which were subsequently the subject of the 13 November Directions/amended on 4 February).

[12] At the 9 November mention, the ASU, United Voice, and the HSU sought for the Commission to reach a view regarding the consent position outlined in the Joint Report. At the Mention, Ai Group expressed concerns in regard to the Joint Report and were directed to file a submission indicating which aspects of the Joint Report they opposed and on what basis.

[13] Ai Group filed a submission,[14] outlining that they had met with the relevant unions and had identified various elements of the consent package about which it had concerns. The parties requested that the matter be listed for conciliation before a Member of the Full Bench to enable them to narrow the scope of differences between them. A conciliation conference was held before Commissioner Lee on 31 January 2019. A Transcript of this conference is available on the Commission's website.

[14] Following the 31 January conference, ABI wrote to the Commission[15] requesting that the matter be listed for further Mention. This was due to the amended draft determination that had been filed by the HSU on 15 February 2019 (along with their submissions and witness statements). ABI alleged that the draft determination filed by the HSU contained additional claims that were not included in their original draft determination (filed 9 November 2018). ABI submit that the additional claims are related to issues which formed part of the consent package.

[15] A further mention was listed before Commissioner Lee on 20 March 2019 to confirm the status of the consent package. A Transcript of the conference is available on the Commission's website. At the conference the parties confirmed that the consent package was no longer in agreement, and a number of parties sought to have the hearing dates listed for April 2019 vacated as a number of additional number of claims were to be pressed that were originally part of the consent package. Commissioner Lee directed that the hearings listed for April would proceed with the substantive claims that were already on foot.

[16] Ai Group then wrote to the Commission seeking another Mention, following the filing of additional material by United Voice[16]. This additional material related to claims that were originally subject to the consent position. The Full Bench issued a Statement[17] on 3 April 2019 outlining issues that would be dealt with at a Mention listed for the same date. At the 3 April Mention, parties were asked to confirm which claims could be heard on the currently listed dates, and discussion took place around witness availability.

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[13] Joint Report, 8 May 2017

[14] Ai Group submission, 30 November 2018

[15] ABI correspondence, 15 March 2019

[16] United Voice supplementary submissions, witness statements and draft determination, 1 April 2019

[17] [2019] FWCFB 2207

[17] A further Statement was issued by the Full Bench on 8 April 2019[18], and a telephone mention was held before the President on 9 April 2019. It was confirmed that the following claims would be heard over three days (15 – 17 April 2019) as follows:

Monday 15 April 2019: United Voice claims

- S44A – deletion or variation to 24 hour care clause;
- S40 – consequential variation to the sleepover clause (arising from the deletion of the 24 hour care clause (S44A));
- S47 – variation to excursions clause;
- S51 – variation to overtime clause; and
- S57 – variation to public holidays clause.

Tuesday 16 April 2019: ASU claim

- S6 – Community language skills

Wednesday 17 April 2019: HSU claims

- S19 – first aid certificate renewal;
- S43 – deleting the 24 hours care clause; and
- S48 – Saturday and Sunday work (casual employees receiving casual loading in addition to Saturday and Sunday rates).

[18] These claims are detailed below at chapter 3.

[19] A list of outstanding claims was attached to the 8 April 2019 Statement. These will be discussed at the commencement of the hearing on 15 April 2019.

3. The claims

3.1 United Voice claims

S44A – deletion or variation to 24 hour care clause

[20] United Voice seek to delete clause 25.8 from the SCHADS Award. The clause deals with 24 hour care and is set out below:

> **25.8 24 hour care**
>
> This clause only applies to home care employees.
>
> (a) A 24 hour care shift requires an employee to be available for duty in a client's home for a 24 hour period. During this period, the employee is required to provide the client with the services specified in the care plan. The employee is required to provide a total of no more than eight hours of care during this period.

[18] [2019] FWCFB 2324

(b) The employee will normally have the opportunity to sleep during a 24 hour care shift and, where appropriate, a bed in a private room will be provided for the employee.

(c) The employee engaged will be paid eight hours work at 155% of their appropriate rate for each 24 hour period.

S40 – consequential variation to the sleepover clause (arising from the deletion of the 24 hour care clause (S44A))

[21] United Voice seek a consequential amendment to clause 25.7(a) (arising from the deletion of the 24 hour care clause) as follows:

25.7 Sleepovers

(a) A sleepover means when an employer requires an employee to sleep overnight at premises where the client for whom the employee is responsible is located (including respite care) ~~and is not a 24 hour care shift pursuant to clause 25.8 or an excursion pursuant to clause 25.9.8~~.

S47 – variation to excursions clause

[22] United Voice seeks the following amendment to clause 25.9(a)(ii):

25.9 Excursions

Where an employee agrees to supervise clients in excursion activities involving overnight stays from home, the following provisions will apply:

(a) Monday to Friday excursions

(i) Payment at the ordinary rate of pay for time worked between the hours of 8.00 am to 6.00 pm Monday to Friday up to a maximum of 10 hours per day.

(ii) The employer and employee may agree to accrual of time instead of overtime payment for all other hours. Time accrued will be calculated at the overtime rate.

(iii) Payment of sleepover allowance in accordance with the provision of clause 25.7.

(b) Weekend excursions

Where an employee involved in overnight excursion activities is required to work on a Saturday and/or Sunday, the days worked in the two week cycle, including that weekend, will not exceed 10 days.

S51 – variation to overtime clause

[23] United Voice seeks the following variation to clause 28.1(b)(iv):

28.1 Overtime rates

…

(b) Part-time employees and casual employees

(i) All time worked by part-time or casual employees in excess of 38 hours per week or 76 hours per fortnight will be paid for at the rate of time and a half for the first two hours and double time thereafter, except that on Sundays such overtime will be paid for at the rate of double time and on public holidays at the rate of double time and a half.

(ii) All time worked by part-time or casual employees which exceeds 10 hours per day, will be paid at the rate of time and a half for the first two hours and double time thereafter, except on Sundays when overtime will be paid for at the rate of double time, and on public holidays at the rate of double time and a half.

(iii) Time worked up to the hours prescribed in clause 28.1(b)(ii) will, subject to clause 28.1(b)(i), not be regarded as overtime and will be paid for at the ordinary rate of pay (including the casual loading in the case of casual employees).

(iv) Overtime rates payable under this clause will be in substitution for and not cumulative upon the shift premiums prescribed in clause 29—Shiftwork and are not applicable to ordinary hours worked on a Saturday or a Sunday~~:~~

~~(A) the shift premiums prescribed in clause 29—Shiftwork; and~~

~~(B) the casual loading prescribed in clause 10.4(b), and are not applicable to ordinary hours worked on a Saturday or a Sunday.~~

S57 – variation to public holidays clause

[24] United Voice seek to vary clause 34.2(c) of the award as follows:

34.2 Payment for working on a public holiday

(a) An employee required to work on a public holiday will be paid double time and a half of their ordinary rate of pay for all time worked.

(b) Payments under this clause are instead of any additional rate for shift or weekend work which would otherwise be payable had the shift not been a public holiday.

(c) Rosters must not be altered for the purpose of avoiding public holiday entitlements under the Award and the NES.

3.2 ASU claim

[25] The ASU seek to insert a new allowance for employees who use community language skills during the course of their employment. The new clause is set out below:

20.10 Community Language and Signing Work

20.10.1 Employees using a community language skill as an adjunct to their normal duties to provide services to speakers of a language other than English, or to provide signing services to those with hearing difficulties, shall be paid an allowance in addition to their weekly rate of pay.

20.10.2 A base level allowance shall be paid to staff members who language skills are required to meet occasional demands for one-to-one language assistance. Occasional demand means that there is no regular pattern of demand that necessitates the use of the staff members language skills. The base level rate shall be paid as a weekly all purposes allowance of $45.00.

20.10.3 The higher level allowance is paid to staff members who use their language skills for one-to-one language assistance on a regular basis according to when the skills are used. The higher level rate shall be paid as a weekly all purposes allowance of $68.00.

20.10.4 Such work involves an employee acting as a first point of contact for non-English speaking service users or service users with hearing difficulty. The employee identifies the resident's area of inquiry and provides basic assistance, which may include face-to-face discussion and/or telephone inquiry.

20.10.5 Such employees convey straightforward information relating to services provided by the employer, to the best of their ability. They do not replace or substitute for the role of a professional interpreter or translator.

20.10.6 Such employees shall record their use of community language skills.

20.10.7 Where an employee is required by the employer to use community language skills in the performance of their duties

a) the employer shall provide the employee with accreditation from a language/signing aide agency

b) The employee shall be prepared to be identified as possessing the additional skill(s)

c) The employee shall be available to use the additional skill(s) as required by the employer.

20.10.8 The amounts at 20.10.2 and 20.10.3 will be adjusted in accordance with increases in expense related allowances as determined by the Fair Work Commission.[19]

[26] In their submission of 18 February 2019,[20] the ASU confirmed that they would not be pressing their claim relating to the coverage clause of the SCHADS Award.

3.3 HSU claims

S19 – first aid certificate renewal

[27] The HSU is seeking the following amendment to clause 20.4:

20.4 First aid allowance

(a) First aid allowance—full-time employees

A weekly first aid allowance of 1.67% of the standard rate per week will be paid to a full-time employee where:

(i) an employee is required by the employer to hold a current first aid certificate; and

(ii) an employee, other than a home care employee, is required by their employer to perform first aid at their workplace; or

(iii) a home care employee is required by the employer to be, in a given week, responsible for the provision of first aid to employees employed by the employer.

(b) First aid allowance—casual and part-time employees

The first aid allowance in 20.4(a) will apply to eligible part time and casual employees on a pro rata basis on the basis that the ordinary weekly hours of work for full-time employees are 38.

(c) First aid refresher

(i) Where an employee is required to maintain first aid certification, the employer will pay the full cost of the employee updating their first aid certification by:

a. reimbursing the employee's registration and attendance expenses; or

b. paying the registration and attendance costs.

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[19] ASU draft determination, 9 November 2018

[20] ASU submission, 18 February 2018

(ii) Attendance at first aid refresher courses will be work time and paid as such.

S43 – deleting the 24 hours care clause

[28] The HSU also seek to delete clause 25.8 of the SCHADS Award which deals with 24 hour care (see para [20] above related to the same United Voice claim).

[29] The HSU also seek a consequential variation to clause 25.7 of the SCHADS Award which deals with sleepovers, as follows:

25.7 Sleepovers

(a) A sleepover means when an employer requires an employee to sleep overnight at premises where the client for whom the employee is responsible is located (including respite care) and is not ~~a 24 hour care shift pursuant to clause 25.8 or~~ an excursion pursuant to clause 25.9.8.

S48 – Saturday and Sunday work (casual employees receiving casual loading in addition to Saturday and Sunday rates)

[30] The HSU is seeking the following variation to clause 26:

26. Saturday and Sunday work

Employees whose ordinary working hours include work on a Saturday and/or Sunday will be paid for ordinary hours worked between midnight on Friday and midnight on Saturday at the rate of time and a half, and for ordinary hours worked between midnight on Saturday and midnight on Sunday at the rate of double time. These extra rates will be in substitution for and not cumulative upon the shift premiums prescribed in clause 29—Shiftwork ~~and the casual loading prescribed in clause 10.4(b),~~ and are not applicable to overtime hours worked on a Saturday or a Sunday.

26.1 (a) Casual employees will receive their casual loading in addition to the Saturday and Sunday rates at clause 26.

(b) The rates are:

(i) in substitution for and not cumulative upon the shift premiums prescribed in clause 29 – Shiftwork; and

(ii) not applicable to overtime worked on a Saturday or Sunday.

[31] The HSU is also seeking the insertion of a new clause 34.2(c) as follows:

34.2 Payment for working on a public holiday

(a) An employee required to work on a public holiday will be paid double time and a half of their ordinary rate of pay for all time worked.

(b) Payments under this clause are instead of any additional rate for shift or weekend work which would otherwise be payable had the shift not been a public holiday.

(c) A casual employee will be paid the casual loading under clause 1.4(b) in addition to the public holiday penalty at clause 34.2(a).

4. Submissions

[32] Submissions and submissions in reply are summarised below in relation to each of the Unions' claims.

4.1 United Voice claims

[33] United Voice has filed submissions and draft determinations seeking a number of variations to the Award.[21] It has provided witness statements in support of its claims.

4.1.1 *S44A—Deletion or variation to 24 Hour care clause*

(a) United Voice submissions in support of their claim

[34] United Voice seeks the deletion of the 24 hour care clause from the SCHADS Award.[22]

[35] United Voice submits that clause 25.8 of the SCHADS Award requires an employee to work for a 24-hour period whilst only being paid for a maximum of eight hours.[23] It further submits that the entire duration of a 24 hour care engagement is considered 'work' and employees should be appropriately remunerated.[24]

[36] Clause 25.8 is drafted in the following terms:

'**24 hour care**

This clause only applies to home care employees.

(a) A 24 hour care shift requires an employee to be available for duty in a client's home for a 24 hour period. During this period, the employee is required to provide the client with the services specified in the care plan. The employee is required to provide a total of no more than eight hours of care during this period.

(b) The employee will normally have the opportunity to sleep during a 24 hour care shift and, where appropriate, a bed in a private room will be provided for the employee.

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[21] United Voice submission, 15 February 2019

[22] Ibid at [37]–[38]

[23] Ibid at [35]–[36.]

[24] Ibid at [23]–[24].

(c) The employee engaged will be paid eight hours work at 155% of their appropriate rate for each 24 hour period.'

[37] United Voice notes that employees should rely on the provisions of the Sleepover clause at 25.7 of the SCHADS award. Clause 25.7 provides that employees will receive an allowance and payment for time worked during a sleepover. United Voice contends that this clause is far more appropriate than the 24 hour care clause, which provides no payment for the sleepover portion of the shift.[25]

[38] United Voice outlines the legal issues concerning clause 25.8 to support its claim. United Voice considers s.62(1) of the Act, which relates to an employee's maximum working hours and s.62(2) of the Act, which provides that an employee may refuse to work additional hours if the request is unreasonable. Section 62(3) of the Act sets out some considerations to determine whether a request or direction to work additional hours is reasonable.[26] One consideration highlighted by United Voice is 'whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours'.[27]

[39] United Voice submits that the 24 hour care shift clause creates situations where employees are effectively liable to work in excess of the notional hours attributed to their engagement. It further notes that when an employee is directed to undertake a 24 hour care shift there is also a contingent request by the employer that the employee perform additional hours of work in emergency situations or according to the care needs of clients for which they are not remunerated. United Voice submits that these hours may be considered additional hours in terms of s.62 of the Act. United Voice states that while s.62 does not deal with intra-day durations of work, there is the merit consideration that the clause allows unreasonable intra-day durations of work which are 'in a practical sense non-negotiable'.[28]

[40] Despite s.62(2) of the Act providing a right for employees to refuse additional work beyond 38 hours a week, United Voice submit that where a 24 hour care shift falls late in the weekly roster cycle, it is likely that an employee will be effectively compelled to work greater than 38 hours. It notes that this is especially the case as clause 25.8 of the SCHADS Award does not provide a means for employees to refuse to work the additional hours. [29]

[41] United Voice also considered Division 2, Part 2-9 of the Act (Part 2-9) which contains sections 322 to 327.[30] United Voice submits that clause 25.8 may breach s.323 of the Act in that it permits an employer to require an employee to work for a 24 hour period but does not require the employer to pay the employee in full for the performance of the work. [31]

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[25] United Voice submission, 15 February 2019 at [40]

[26] Ibid at [18]–[19]

[27] *Fair Work Act 2009* (Cth), s.62(3)(d)

[28] United Voice submission, 15 February 2019 at [20]

[29] Ibid at [22]

[30] Ibid at [27]

[31] Ibid at [30]

[42] United Voice also considers that the clause does not meet the modern awards objective.[32] It submits that clause 25.8 is not consistent with s.134(1)(d) of the Act as the remuneration provided for the unsocial nature of the work is too low[33] and that it also submits that the clause does not promote 'social inclusion though increased workforce participation' (s.134(1)(d)).[34] United Voice further submits that the clause is 'inflexible, inefficient and not conducive to productivity' contrary to s.134(1)(d) of the modern awards objective.[35]

(b) Reply submission of ABI

[43] ABI filed a submission in reply on 5 April 2019. In response to United Voice and HSU's claim to delete clause 25.8 of the SCHADS Award dealing with 24 hour care and the range of submissions advanced in support of the deletion of clause 25.8, ABI submits the Unions' claim should be dismissed. It further states United Voice's claim to remove certain wording in clause 25.7(a) would be an uncontroversial amendment if clause 24.8 is removed.

History

[44] ABI outlines a number of pre-reform awards containing 24 hour care provisions. It submits subsequent to the Award Modernisation process, the modern award has contained a 24 hour care clause since the modern award was created. ABI submits as there was a lack of dispute between the main interested parties the clause was retained and unaltered. ABI notes, that up until these proceedings, aside from a variation by ASU in 2012 to clarify that the clause only applies to home care employees, the clause has operated without any controversy.

The rationale for, and importance of, the 24 hour care clause

[45] ABI submits that the Unions' support for the clause during the Award Modernisation process reflects that these provisions were common features of the pre-reform industrial relations system and represents an acknowledgement of the Award facilitating 24 hour care arrangements. It states the 24 hour clause facilitates the provision of a valuable service to elderly Australians who are in receipt of home care services. ABI submits the award should continue to facilitate the delivery of such a service.

Claims relating to 24 hour care clause (S43, S44A and S40)

[46] ABI outlines the range of submissions advanced in support of the deletion of clause 25.8 as the following:

- the clause is unclear, in that it provides no certainty regarding the hours or work of an employee or the sleeping arrangements to be applied;
- the clause is rarely used;
- the entire engagement is 'work' and should be remunerated as such;
- the clause does not adequately compensate employees, or provides for remuneration at a "discounted rate", for the time they are required to be available for work;

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[32] Ibid at [31]

[33] Ibid at [32]

[34] Ibid at [34]

[35] Ibid

- the clause may breach s.323 of the FW Act because it permits an employer to require an employee to work for a 24 hour period but does not require the employer to pay the employee in full for that work;
- the clause creates situations where an employee is effectively liable to work in excess of the notional hours attributed to the engagement, and the hours that such engagements will 'require' the employee to work are not foreseeable; and
- leaving employees for lengthy periods on duty dealing with complex interpersonal matters is problematic.

[47] ABI made three observations about the current clause. Firstly, the clause must be given the characteristics pertaining to the sector where the operation of the clause is limited to employees working in the home care stream. Secondly, the clause explicitly requires an employee to provide "no more eight hours of care" although the clause's requirement for an employee to be available for duty in a client's home for 24 hour period. Lastly, the clause provides for a loading of 155% of the appropriate rate of pay for 8 hours of performed work.

Alleged ambiguity or lack of clarity

[48] ABI states that HSU and the United Voice's concerns about the lack of clarity in the clause appear to be that the clause is silent as to what happens when an employee is required to work more than 8 hours of work, the lack of certainty about the hours or work of an employee, and that the clause is unclear regarding aspects relating to sleeping.

[49] ABI confirms that the clause does not specify what happens where an employee is required to perform more than 8 hours' work during a 24 hour care shift. ABI highlight that there is a degree of tension as an employee is required to be available for duty for a 24 hour period and yet an employee is required to provide a total of no more than eight hours of care during the period. ABI submits that although an employee is not required to perform any more than 8 hours' work there may be occasions where additional work (which if an employee agrees to perform) is required which would be regulated by the overtime provisions. It submits the clause reflects the proper construction of the current award as it indicates the principles of the interpretation of industrial instruments.

[50] ABI rejects that the clause provides no certainty concerning the hours or work of an employee. It notes the clause expressly addresses this in its wording. ABI highlights that there is some flexibility as to when the 8 hours of work are to be performed over the 24 hour period but the span of engagement is clearly known to an employee.

[51] ABI accepts that the current clause does not expressly provide that employees will be provided with "a safe and clean space to sleep" but it is not aware the absence of any wording has raised an issue. ABI contends there is no evidence (before the Commission) that the clause is not operating sensibly. However, if the Commission views there is ambiguity and if clarification is beneficial, ABI would not be opposed to the clause being varied as long as the substance of the clause is not altered and consistent with s.134(1)(g) of the FW Act. It stresses that the finding of ambiguity in the clauses' operation does not warrant the deletion of the clause.

Prevalence of use of the 24 hour care clause

[52] ABI maintains the clause is utilised by a number of employers throughout Australia although not frequently used by all employers. It states that there are a large number of operating enterprise agreement in the home care sector that contain 24 hour care provisions.

An allegation that the entire 24 hour period is "work"

[53] ABI submits situations where employees are required to be on-call or be on stand-by is reflected in a range of provisions and these situations are not unusual. It submits clause 25.8 of the Award is no different to a large number of other modern awards which require employees to be on-call. ABI notes various modern awards deal with those situations differently and there are different compensation mechanisms based on specific obligations on the employees and the industry.

Remuneration applying to 24 hour care shifts

[54] ABI submits that the Unions do not provide indication as to what level of remuneration would be adequate. It submits there is no evidence before the Commission to depart from the prima facie provision that 155% loading is appropriate compensation for the work undertaken.

Alleged arguable contravention of section 323 of the FW Act

[55] ABI considers that clause 25.8 does not contravene s.323 of the FW Act. It submits United Voice's submission that there may be a breach should be rejected.

Fatigue concerns

[56] ABI suggests United Voice's assertion that "leaving one employee for long periods of time to deal with complex interpersonal matters is problematic" is not supported by any evidence and should be disregarded. It submits the deletion of the 24 hour care clause would be a significant step which would have adverse implications for the relevant community who receive care in their home.

(c) Reply submissions of AFEI

[57] AFEI submit that the United Voice claim regarding clause 25.8 of the SCHADS Award is not made out on its arguments or by evidence. AFEI states that clause 25.8 clearly states that an employee is required to provide a total of no more than eight hours of care during this period. They submit that United Voice's claim that clause 25.8 in someway offends s.62 of the Act, because there is no facility for employees to refuse additional hours that may be required, should not be accepted. AFEI submits that United Voice has not produced any evidence of employees being unreasonably required to provide more than 8 hours' care during a 24 hour care shift, nor of any employees who have sought to reasonably refuse to provide more than 8 hours' care during a 24 hour care shift.

(d) Reply submission of NDS

[58] The NDS discuss this claim in conjunction with United Voices' claim regarding S40—variation to the sleepover clause and the HSU's claim regarding S43—deletion of 24 hour care clause.

[59] The NDS opposes the HSU and United Voice's submissions to delete the 24 hour care provision as there is insufficient precision about whether the payment adequately covers all the work performed. The NDS submit that the following variation would be preferable to deleting a clause that facilitates the provision of a type of support that is of value to aged and disabled people in certain circumstances. They suggest amending it to provide that the 55% loading is payment for any additional work required of up to 2 hours, with overtime payable for all work performed beyond that amount.

4.1.2 *S40—Variation to sleepover clause (consequential variation stemming from S44A)*

(a) United Voice submissions in support of their claim

[60] United Voice seeks the deletion of the words 'and is not a 24 hour care shift pursuant to clause 25.8' from clause 25.7(a) of the SCHADS Award to ensure that employees previously undertaking 24 hour care shifts will be covered by the provisions of the sleepovers clause.[36]

(b) Reply submission of ABI

[61] ABI rely on its submissions provided for at claim 4.1.1.

(c) Reply submission of NDS

[62] The NDS relies on its submissions provided for at claim 4.1.1.

4.1.3 *S47—Variation to Excursions clause*

(a) United Voice's submissions in support of their claim

[63] Clause 25.9(ii) of the SCHADS Award provides that where an employee agrees to supervise clients on excursion activities that may involve overnight stays, then 'the employer and employee may agree to accrual of time instead of overtime payment for all other hours'.

[64] United Voice submit that clause 25.9(ii) is ambiguous as to whether the accrual of time would be equivalent to the normal hourly rate or overtime. United Voice therefore seeks to vary clause 25.9(ii) to read:

> 'The employer and employee may agree to accrual of time instead of overtime payment. The time accrued will be calculated at the overtime rate.' [37]

[65] United Voice submits that the clause contravenes s.134(1)(da) of the modern awards objective as it is ambiguous as to whether employees will be compensated for working overtime. It further submits that amending clause 25.9(ii) as proposed would satisfy this

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[36] Ibid at [47]

[37] Ibid at [44]

objective by ensuring that workers who are required to undertake excursion shifts at unsocial hours are compensated appropriately.[38]

[66] United Voice submits that it would not be fair to employees to be provided with the accrual of time at an hour for hour rate rather than to be paid overtime. Such an arrangement clearly benefits employers and does not reflect the true value of the work undertaken by the employee. It further submits that the clause in its current form allows employers to apply pressure to employees to accept accrual of time at an hour for hour rate instead of paying overtime or accrual of time at the overtime rate for the hours worked during an excursion in which they would ordinarily be entitled to overtime rates. United Voice submits that amending clause 25.9(ii) as proposed ensures that employees are compensated appropriately if they are to work unsocial or unusual hours.[39]

(b) Reply submission of Ai Group

[67] Ai Group oppose United Voice's claim to vary clause 25.9(a)(ii). It contends that there is no appropriate justification for United Voice's claim and that the claim should be dismissed.

Nature of clause 25.9 and the general 'time off in lieu of payment for overtime' clause

[68] Ai Group submit that clause 28.8 of the Award provides a general capacity for employees and employers to agree on an arrangement that involves an employee taking time off in lieu of payment for overtime. Ai Group contend that clause 28.8 provides that time off will be calculated on an hour for hour basis and operates in the opposite manner than what is being pursued by United Voice in the context of clause 25.9.

[69] Ai Group contend that clause 25.9 serves a different purpose to clause 28.8 as it operates in circumstances where an employee agrees to supervise clients in excursion activities involving overnight stays from home. Ai Group contend that it does not apply in a context where an employee has been directed to perform overtime, rather that it operates where the 'overtime work' has been performed on a voluntary basis. It submits that in the current proceedings, no party has sought to argue that the provisions of clause 28.8 should be amended, nor have they questioned the appropriateness of clause 25.9 generally. The only amendment sought is to the rate at which time off should be calculated. Ai Group contend that it would be anomalous for clause 25.9 to require that time off in lieu of overtime be calculated at overtime rates, while the general time off in lieu of payment for overtime provision operates on a time for time basis.

The 'unfairness' argument

[70] Ai Group submit the starting position for employees that work overtime in the circumstances contemplated by clause 25.9 is that they receive payment at the appropriate overtime rate. It is only with employee agreement that a time off arrangement can be applied. Ai Group submit that it would be axiomatic that where the provision is being utilised, an employee finds that time off (and not overtime penalties) is unfair in its operation to them.

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[38] Ibid at [45]

[39] Ibid at [46]

[71] Ai Group further submit that the proposed variation may result in employers ceasing to agree to such arrangements. It contends that it might not be practical and achievable for an employer to provide an employee with time off at overtime rates. An employer might also cease to see a benefit in acceding to an employee request to time off in lieu of payment for overtime in circumstances where the period of absence must be calculated at overtime rates.

The 'employer benefit' argument

[72] Ai Group contend that awards must operate in a manner that is fair having regard to the perspective of both the employer and employee and that any variation to the Award which reduces or removes this benefit would be a negative consideration when considered in the context of s.134(1)(f). The fact that the terms of clause 29.5(a)(ii) can only be accessed with agreement from the employee suggests that time off in lieu will only likely be triggered where it is mutually beneficial to both the employee and the employer and not otherwise.

The 'pressure' and 'power imbalance' argument

[73] Ai Group submit that United Voice have provided no evidentiary basis for their contention about 'pressure' being placed on employees to sacrifice their overtime penalty payments in lieu of time off or the purported 'power imbalance' which they say is part of their claim. Ai Group state that there is also no evidence or submissions to indicate that proceedings are being instituted for employees under the Award as a result of coercion or pressure from employers over matters where 'employee agreement' is the relevant criteria. Further, Ai Group submit that there are comprehensive protections under the Act to protect employees from coercion or adverse action for exercising or making a complaint in relation to a workplace right.

Section 138 and the Modern Awards Objective

[74] Ai Group submit that in relation to s.134(1)(a) there is no evidence for the Commission to conclude that the relative living standards and needs of the low paid will be enhanced or improved if the claim is granted.

[75] In relation to s.134(1)(b), Ai Group contend that there is no evidence that granting the variation would encourage collective bargaining and to the extent that the variation delivers United Voice, other unions or employees an outcome which they might otherwise pursue through enterprise bargaining, the factor might weigh against the granting of the claims.

[76] In relation to s.134(1)(c), Ai Group contend that there is no evidence that might enable the Commission to conclude that the grant of the claim will improve social inclusion through increased workforce participation. It submits that it is foreseeable however that the variation may cause employers to be less willing to agree to employees taking time off in lieu of providing a payment. This reduction in flexibility may impact on the ability of employees to balance their work and personal commitments and as such may undermine their ability to participate in the workforce. This would weigh in favour of rejection of the claim.

[77] With regards to s.134(1)(d), Ai Group contend that the proposed variation undermines the need to promote flexible modern work practices and the efficient and productive performance of work by necessitating longer staff absences in circumstances where time off

in lieu is granted under the clause. It contends that the work of servicing clients on excursions may not be able to be undertaken due to the additional costs and restrictions that would flow from the variation.

[78] With regards to s.134(1)(da), Ai Group submit that it is a neutral consideration in relation to this claim. Ai Group contend that United Voice's reliance on this section of the Act to support the proposed variation is misguided. Ai Group refer to paragraphs 184 to 202 of the *Penalty Rates Decision* which sets out the operation of s.134(1)(da) of the Act. It contends that United Voice has failed to apprehend that this subsection makes 'additional remuneration' the relevant consideration, with such remuneration being additional to that which is paid for working 'ordinary hours'. Ai Group submit that clause 25.9(a)(ii) in its current and proposed form is concerned with time off, not additional remuneration and that it is arguable that s.134(1)(da) warrants no consideration in relation to United Voice's proposed variation. Further Ai Group submit that s.134(1)(da) is not a statutory directive that additional remuneration must be paid to employees. Ai Group submit that the fact that clause 25.9(a)(ii) operates with two layers of consent, the first being employee agreement to supervise clients in excursion activities involving overnight stays from home, and the second being agreement to take time off in lieu of overtime payments is relevant in considering whether an additional benefit greater than 'time for time' should be conferred on employees. Ai Group submit that having regard to the consent required by the clause, a greater benefit is not warranted or justifiable. Ai Group contend that the Award does provide additional remuneration for employees working overtime hours, at clause 28 of the Award.

[79] In relation to s.134(1)(e), Ai Group submit that the principle of equal remuneration for work of equal or comparable value is not relevant to this matter.

[80] With regards to s.134(1)(f), Ai Group contend that the claim, if granted, would increase the accrual of time being provided to employees in the circumstances contemplated by clause 29.5 by a factor of at least 50% and up to 100%, and this would therefore have an adverse impact on business, in particular rostering practices of employers.

[81] In relation to s.134(1)(g), Ai Group submit that the current Award can properly be read so as to enable time off in lieu of overtime to be accrued on a 'time for time' basis. Ai Group submit that it would not oppose a variation to the Award to clarify this outcome and that this would assist in ensuring the Award is simple and easy to understand.

[82] In relation to s.124(1)(h), Ai Group submit that there is no evidence dealing with the impact of the claim on employment growth, inflation and the sustainability, performance and competitiveness of the national economy. It contends that this is accordingly a neutral consideration.

(c) Reply submissions of ABI

[83] United Voice propose to vary clause 25.9(a) to remove ambiguity in the way TOIL is calculated or accrued where employees agree to supervise clients in excursion activities involving overnight stays away from home during the week to allow for 'time for penalty' rather than 'time for time' accrual.

[84] ABI submit the current clause is not ambiguous and the 'time for time' approach has been the prevailing or default position since the Family Leave Test Case;[40] They submit the current clause reflects the award's main TOIL provision at clause 28.2 and also the position of the principal precursor awards *Social and Community Services (ACT) Award 2001* and *Social and Community Services (State) Award (NSW)*. In the event the Commission finds the clause ambiguous ABI would not oppose insertion of wording clarifying the TOIL is taken on a 'time for time' basis.

[85] ABI further submit the clause currently does compensate an employee for working overtime. It is only when the employee elects to take the overtime as TOIL that there would be no overtime payment. In addition, they contend the current construction of the clause allows the employee to determine the value they put on their work – either payment or TOIL. Also, United Voice's suggestion that the current clause allows employers to pressure employees to take TOIL is unsupported.

[86] Finally, ABI contend UV have ignored the decisions of the Full Bench in the Award Flexibility decisions in 2015[41] and 2016[42] that TOIL should be provided on a 'time for time' basis.

(d) Reply submission of AFEI

[87] AFEI opposes United Voice's variation to the excursion clause. AFEI submit that there is no ambiguity in clause 25.9(a) and that it does not involve compensation for working overtime. AFEI submit that providing a different method for calculating TOIL for an excursion is only likely to create confusion for employers and employees. AFEI submit that the *Family Friendly Test Case* [2015] FWCFB 4466 held that the time for time rate reflected the value placed on time off work by employees to better reconcile work and family commitments.

[88] AFEI submit that United Voice has not lead any probative evidence, and has not been able to demonstrate that the SCHADS Award does not achieve the modern awards objective.

[89] AFEI submit that a variation would have administrative and cost related impacts and there would be two separate methods for TOIL accrual, depending on whether the overtime was worked during an excursion or some other circumstance.

(e) Reply submission of NDS

[90] The NDS submit that there is no ambiguity in the excursions clause in response to the claim by United Voice seeking to vary it. They claim that if it were determined that there is an ambiguity, this could be addressed by an amendment to clause 25.9(ii) which references the overtime clause of the SCHADS Award.

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[40] Family Leave Test Case - November 1994 (1994) 57 IR 121; Family Leave Test Case, Supplementary Decision (1995) AILR 3-060 L6900

[41] [2015] FWCFB 4466

[42] [2016] FWCFB 4258

[91] In response to United Voice's claim that in the case of excursions time off should accrue and be taken on a penalty rates basis rather than time for time as applies for all other overtime worked under the SCHADS Award, the NDS state that no evidence has been provided of any need to change the level of entitlement.

4.1.4 *S51—Variation to Overtime clause*

(a) United Voice submission in support of their claim

[92] United Voice supports the HSU in their claim to vary clause 28 of the SCHADS Award to ensure all time worked beyond rostered hours is paid at overtime rates. [43]

[93] United Voice maintains its claim to amend clause 28.1(b)(iv) of the SCHADS Award to ensure casual employees are paid the casual loading when working overtime. The proposed amendment is as follows:

> '(iv) Overtime rates payable under this clause will be in substitution for and not cumulative upon the shift premiums prescribed in clause 29—Shiftwork and are not applicable to ordinary hours worked on a Saturday or a Sunday.'

[94] In their submission, United Voice refer to the *4 yearly review of modern awards – Penalty Rates Decision* in which the Full Bench made repeated references to the views of the Productivity Commission concerning the interaction of penalty rates and the casual loading:

> 'In some awards, penalty rates for casual employees fail to take into account the casual loading, which distorts the relative wage cost of casuals over permanent employees on weekends (and particularly Sundays). The wage regulator should reassess casual penalty rates on weekends, with the goal of delivering full cost neutrality between permanent and casual rates on weekends, unless clearly adverse outcomes can be demonstrated. This would imply that casual penalty rates on weekends would be the sum of the casual loading and the penalty rates applying to permanent employees.'[44]

[95] United Voice further notes that the Productivity Commission described a 'default approach' where:

> '… the casual loading is always set as a percentage of the ordinary/base wage (and not the ordinary wage plus the penalty rate). The rate of pay for a casual employee is therefore always 25 percentage points above the rate of pay for non-casual employees.'[45]

[96] United Voice notes that the Commission indicated a preference for the default approach as:

> '…the casual loading is paid to compensate casual employees for the nature of their employment and the fact that they do not receive the range of entitlements provided to

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[43] Ibid at [152]

[44] Ibid at [333]

[45] Ibid at [335]

full-time and part-time employees, such as annual leave, personal/carer's leave, notice of termination and redundancy benefits.'[46]

[97] The Commission in the Penalty Rates Decision stated a preference for the default approach generally whenever it reduced or altered rates in relation to the modern awards subject to the review.[47] United Voice notes that the default approach is consistent with s.134(1)(g) of the modern award objective, which requires that modern awards are 'simple, easy to understand, stable and [provide a] sustainable system for Australia that avoids unnecessary overlap of modern awards'.[48] Additionally, United Voice submits that s.134(1)(da)(iii) of the Act, which deals with the need to provide additional remuneration for employees working unsocial hours, provides support for the casual loading being an additional amount paid when any penalty or loading applies to work at an unsocial time. It contends that subsuming the casual loading into other penalties and loadings also means that a casual employee is not compensated for disutility determined to apply for the hours worked. [49]

[98] Moreover, United Voice submits that the preferred position in relation to the treatment of the casual loading is that it should be disaggregated from penalties and loadings generally. This is not the case in the SCHADS Award as it currently stands. United Voice proposes to amend the SCHADS Award to be consistent with preferred practice in relation to the treatment of the casual loading. [50]

(b) Reply submission of Ai Group

[99] Ai Group opposes the HSU and United Voice's claims as they do not provide any evidence to support them.

[100] They assert that the Unions' claims simply seek to re-litigate matters ventilated in the two-year review and have not provided any justification for departing from the Full Bench's decision ([2014] FWCFB 379) regarding overtime or the Vice President's decision regarding weekend penalty rates.

[101] They submit that since the Part 10A Award Modernisation, casual employees' entitlements have materially increased and the imposition of additional employment costs in such circumstances is inconsistent with the need to ensure a stable system.

[102] They state that the unions make much of the Penalty Rates Decision, specifically, the Commission's decision to require the payment of the casual loading in addition to weekend penalty rates in certain awards. Ai Group submit the following in response:

> (a) Whilst the term 'default approach' is referenced by the unions and was referenced by the Commission in the Penalty Rates Decision, the proposition that the casual loading be paid in addition to weekend and overtime penalty rates is not in fact the default approach adopted in the awards system. The term (i.e. 'default approach') is

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[46] Ibid at [337]

[47] Ibid

[48] Ibid at [333]-[338]

[49] United Voice submission, 15 February 2019 at para [161]

[50] Ibid at [163].

one that was simply coined by the PC for the purposes of its report. Quite appropriately, in our submission, a consistent approach does not in fact appear across the modern awards system.

(b) The issue of whether casual employees are entitled to the casual loading in addition to weekend penalty rates or overtime is one that must be considered on an award-by-award basis. There may be a number of reasons why, in the instance of a particular award, the 'default approach' is not appropriate. Ultimately the matter is one that must be considered by the Commission by reference to the legislative constraints imposed by ss.134(1) and 138. This will necessarily involve a range of considerations including the capacity of employers to absorb the relevant additional employment costs. The history of the award entitlements may also be relevant.

(c) The adoption by the Commission of the PC's 'default approach' in the context of a small number of awards where the Commission decided to reduce Sunday penalty rates does not constitute "general and authoritative consideration of [the] issue at the level of industrial principle", as contemplated by the Full Bench that heard the ASU's appeal. Accordingly, the basis for revisiting the issue, as contemplated by that Full Bench, does not arise.

[103] The Ai Group submit that there is no evidence or material that might justify the proposition that the provisions proposed by the HSU or United Voice are necessary to ensure that the Award achieves the modern awards objective. They submit a proper foundation for the claims has not been made out and they should therefore be dismissed.

(c) Reply submission of ABI

[104] ABI object to United Voice's position that casual loadings and overtime rates serve different functions and both should be payable. In their submission ABI contend it would be reasonable to conclude the claim is a proposal to vary the minimum wage under s. 256(3) of the Act so can only succeed if justified by work value reasons[51] which United Voice have not met.

[105] ABI further submit United Voice's have not considered the background of the clause and the ASU's previously unsuccessful claim. ABI identified that this issue was part of the ASU claim which was declined in the 2 yearly review VP Watson decision in 2013[52] and when a Full Bench re-determined the matter, it found the overtime rates were payable to casuals but should be in substitution of the casual loading, as casuals gaining access to overtime penalty rates was already an additional benefit to casual employees.[53] ABI submit that although the Full Bench specifically noted their decision did not prevent further consideration of this issue for the SCHADS Award in the 4 yearly review process[54] the Commission should not depart from the Full Bench's finding unless there are cogent reasons to reconsider it. ABI advise as there are no cogent reasons advanced United Voice's claim should be dismissed.

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[51] ABI & NSWBC and others submission in reply, 5 April 2019 at 11.5

[52] [2013] FWC 4141 at [34]-[36]

[53] [2014] FWCFB 379 at [42]-[44]

[54] Ibid at [45]

(d) Reply submission of NDS

[106] The NDS discuss this claim in conjunction with the HSU's claim regarding S48—Saturday and Sunday work (casual employees receiving casual loading in addition to Saturday and Sunday work).

[107] In response to the HSU and United Voice seeking to make casual loading payable in addition to overtime, weekend and public holiday penalties, the NDS submit their opposition. They claim the award currently provides for these payments to be in substitution for casual loading. They state that, though the Unions rely on principles established by the Penalty Rates Decision, they fail to provide evidence addressing the range of factors identified in the Decision, let alone in relation to the modern awards objective.

[108] They further submit that the effect of the unions' claims would be to significantly increase the wage cost for the provision of a wide range of social services for employers who are largely dependent on government funding or, in the case of the NDIS, a fixed price over which they have no control. They state that the result is likely to be a reduction in services to vulnerable members of the community.

(e) Reply submission from Business SA

[109] Business SA submit that the *Penalty Rates Decision* is not evidence that the SCHADS Award should be varied as it was applicable specifically to the hospitality and retail sectors and the terms contained within those Awards.

[110] Business SA submit that in regard to compensation for leave entitlements, full-time and part-time employees do not receive accruals of annual leave, personal/carer's leave or other benefits on overtime penalties. It submits that if casual employees receive an additional 25% casual loading on overtime, this would result in casuals receiving compensation for an entitlement that full-time and part-time employees do not.

[111] Business SA submit that United Voice have not provided evidence that varying the SCHADS Award would provide greater consistency among awards. It is Business SA's view that the needs of the industry are paramount when considering an application for variation. Business SA submit the SCHADS industry has low margins, cost pressures and in the digital age risks an influx of gig economy style work practices that must be taken into consideration. Business SA submit that a significant number of employers who engage employees under the SCHADS Award are not-for-profits or charities and wants to ensure the continued viability of the industry.

[112] Business SA submit the Commission must be cautious in implementing variations and increases that will have counter intuitive results to the industry and its stakeholders.

4.1.5. S57—*Variation to Public Holiday clause*

(a) United Voice submission in support of their claim

[113] United Voice cites ss.114 and 116 of the Act and submits that employers are altering the rosters of part-time employees to avoid the payment of public holiday rates. In order to

prevent this practice, United Voice proposes that clause 34.2 of the SCHADS Award should be amended with the addition of clause 34.2(c) as follows:

> '34.2(c) Rosters must not be altered for the purpose of avoiding public holiday entitlements under this Award and the NES.'

[114] United Voice contends that this variation is consistent with the modern awards objective, primarily in ensuring that the SCHADS Award is 'fair and relevant' and provides that part-time employees do not receive less pay than they are entitled to.

(b) Reply submission of Ai Group

[115] Ai Group opposes United Voice's proposed new clause 34.2(c) designed to prohibit roster changes for the purpose of avoiding public holiday entitlements under the Award and the NES. It states that there is no evidence before the Commission of the occurrence of employers altering rosters of part-time employees in order to avoid payment of public holiday rates. Therefore they submit there is no basis for the variation proposed.

[116] They further submit that the proposed clause may be relied upon by employees or union representatives as an avenue for disputing roster changes made by an employer in relation to a public holiday due to legitimate operational reasons which are not coloured by any intention to avoid public holiday entitlements. They submit that this would be unnecessarily and unjustifiably disruptive.

(c) Reply submission of ABI

[117] ABI submit this claim should be dismissed as the current Award clause does not permit part-time rosters to be altered at whim as asserted by United Voice. The current Award has a 7 day notice period for roster changes and changes to set patterns of work can only be made by agreement with the employee subject to the consultation clause.

(d) Reply submission of AFEI

[118] AFEI opposes United Voice's public holiday claim. It submits that United Voice has provided no probative evidence that 'there are some employers who are altering the rosters of part-time employees to avoid the payment of public holiday rates.'

(e) Reply submission of NDS

[119] The NDS oppose United Voice's proposed new clause 34.2(c) which they submit is designed to prohibit roster changes for the purpose of avoiding public holiday entitlements under the Award and the NES. The NDS states that there is no evidence before the Commission of the occurrence of employers altering rosters of part-time employees in order to avoid payment of public holiday rates. Therefore they submit there is no basis for the variation proposed.

[120] They further submit that the proposed clause may be relied upon by employees or union representatives as an avenue for disputing roster changes made by an employer in relation to a public holiday due to legitimate operational reasons which are not coloured by

any intention to avoid public holiday entitlements. They submit that this would be unnecessarily and unjustifiably disruptive.

4.2 ASU Claim

4.2.1 *S6—Community Language Allowance*

(a) ASU submission in support of claim

[121] The ASU seeks to insert a new clause 20.10 to provide for a community language allowance to remunerate employees when they use a language other than English in the course of their duties.

[122] The ASU submit that the inclusion of the clause would:

- Recognise and endorse the fundamental principles of the Equal Remuneration Order (ERO) which recognise equal pay for equal work in the social and community services sector
- Better position community sector organisations to meet the policy challenge of ensuring access and equity for Australia's culturally and linguistically diverse population
- Assist in the provision of the highest standard of effective professional communication, programmes and services that are responsive to the needs of all Australians
- Be an efficient and effective use of limited resources in the community sector, allowing less reliance upon external translators and interpreters
- Be capacity building for the community sector workforce, which is currently the fastest growing sector in the country.

Language skills are vital to the industry but are not remunerated

[123] The ASU contend that language skills are vital to the industry but are not remunerated. The ASU submit that because of the nature of the work performed by employees in the community sector, language skills are highly sought after by employers. This skill is often enhanced by a deep understanding of cultural issues associated with the language(s) in which the employee is proficient.

[124] The ASU submit that the use of language skills is not contemplated by the classifications of the Award and it is therefore not compensated for in the base rates of pay provided by the Award and ERO.[55]

[55] PR525485

Bilingual workers are valued by employers

[125] The ASU submit that employers actively seek out bilingual employees as a more efficient and cost effective means to service culturally and linguistically diverse communities rather than engaging translators or interpreters.

[126] The ASU submit that the value of bilingual employees is recognised as providing a superior professional service to clients and the community, particularly where a community organisation works with complex and/or traumatised persons or in regional and remote communities where cultural and political barriers mean an interpreter may be rejected by the client.

Alternatives to using bilingual workers

[127] The ASU submit that while there may be times where it is appropriate to use professional interpreters and translators, the use of bilingual staff is far more efficient for social and community sector organisations and that the availability of bilingual workers means that funds used to pay for interpreters could be directed towards the delivery of programs to the community. It is further submitted the process of engaging an interpreter is time consuming and often impossible to arrange for a meeting or appointment. The ASU also express concern with engaging an interpreter who lacks the requisite qualifications and experience required for social and community sector work.

[128] The ASU submit that it is common for community, family members and unqualified employees to act in the capacity of a translator, and that these arrangements can be traumatic for both the client and the worker concerned.

Capacity building in the social and community sector

[129] The ASU submit that employers in the social and community sector report difficulty in finding adequately skilled staff and that providing a CLAS system in the community sector equal to that paid to government employees would enhance opportunities for the sector to attract the best possible employees. The ASU further submits that payment of a CLAS would also be capacity building for the community sector.

[130] The ASU submit that being culturally and linguistically diverse is a barrier to accessing essential services such as the National Disability Insurance Scheme. The ASU cites a report commissioned by Family and Community Services and Aging Disability and Home Care ("ADHC") and completed by Settlement Services International which makes clear that the lives of people with a disability would be improved if there was more access to community language speakers in the NDIS, both at the assessment stage and support stage. The ASU note that it is acknowledged in the report that there is a lack of cultural competency within organisations that provide support under the NDIS.

(b) Reply submission of Ai Group

[131] Ai Group oppose the ASU's claim for two new allowances to be payable to employees who use languages other than English in the course of their duties.

Deficiencies in the proposed clause

[132] Ai Group submit there is an obvious problem with the proposed clause in that it does not clearly define what a 'community language skill' is. It submits that while clause 20.10.4 and 20.10.5 come close to defining the term, they do not establish any clear criteria against which an employee could be assessed and said to possess and utilise such skill.

[133] Further, it is submitted that the clause does not require any particular level of proficiency in the relevant language so as to entitle the employee to the payment of the allowance. Ai Group submit the description of such employees as conveying straightforward information relating to services provided by the employer "to the best of their ability" in clause 20.10.5 falls well short of providing a workable basis for determining who should be eligible.[56]

[134] In relation to clause 20.10.7, Ai Group observes the clause mandates that an employer who requires an employee to use community language skills "shall provide the employee with accreditation from a language/signing aid agency". Ai Group submits this is unclear and no explanation is provided on this point in the ASU's submissions.

[135] Ai Group further submit difficulties arise from the fact that eligibility to the entitlement appears to only arise, in clause 20.10.1, where an employee is using the relevant skill "as an adjunct" to their normal duties. It submits that if the ordinary meaning of the term adjunct is adopted, the employee would not receive the allowance pursuant to the proposed clause as the employee is engaged to perform services that are routinely or normally included the exercise of community language or signing skills. Ai Group contend that this approach is likely to result in uncertainty as to when the clause would have application.

[136] Ai Group contend the clause leaves an employer with no ability to manage their exposure to liability for the proposed allowance as the proposed clause appears to entitle an employee to payment whenever an employee uses their community language or signing skills. Ai Group submit that the clause does not confine the application of the entitlement to circumstances where an employer requires the use of those skills nor in circumstances where the use of those skills is essential or beneficial to the provision of the service.

[137] In its submissions, Ai Group contend that as the employee does not have to undertake any training or qualification to be entitled to the payment, the proposed payment is not in the nature of a reimbursement to the expense they have occurred in acquiring those skills. Ai Group submit that this can be contrasted with the approach taken within awards in the context of other allowances payable for the exercise and possession of particular skills and qualifications, such as a first aid allowance.[57]

Quantum of the Proposed Allowances

[138] Ai Group further submit the claim should be rejected as the ASU have not identified any reasoning behind their selection of the quantum of the proposed allowances. It continues

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[56] Ai Group reply submission, 8 April 2019 at [259]

[57] Ai Group reply submission, 8 April 2019 at [266]–[267]

to say that the Commission cannot therefore conclude that the specific allowances proposed are necessary in the sense contemplated by s.138 of the Act.

[139] Further Ai Group take issue with both the eligibility to one allowance over the other as well as when the allowance is payable. Ai Group submit it is arguably illogical that the base level allowance of $45.00 is payable when there is no regular pattern of demand for the skills, while the higher allowance of $68.00 is payable in circumstances where the assistance is provided on a "regular basis".

[140] Ai Group further submit it is unclear whether these allowances are to be paid every week to an employee, regardless of whether the skills are utilised in that period. It continues that it appears the base rate is payable every week provided there is a requirement for the employee to occasionally use the skill. Ai Group submit that in contrast it appears the higher rate is only payable "…according to when the skills are used" in 20.10.3.[58]

[141] Ai Group submit the ASU submission does not address why the allowance has been characterised as an all-purpose allowance. Ai Group submit that characterising the allowance in this way raises uncertainties about whether and how other clauses intend to interact with the new provision. It queries, for example, whether it is intended for various penalty rates to be applied to the allowance so as to compound the quantum that would be payable.

[142] Ai Group also submit that no explanation has been provided as to why the new allowances are set as weekly allowances. It submits there is no apparent reason why an employee who potentially works as little as one hour in a given week should be eligible to receive the same allowance as an employee who work 38 hours a week. Ai Group submit that that given the high proportion of employees who work on either a casual or part time basis, structuring the allowance in this way could have significant adverse cost implications for employers.

Clause 20.10.7 of the Proposed Provision

[143] In relation to clause 20.10.7, Ai Group submit the ASU has failed to identify how much of an administrative burden would be imposed upon employers with providing the employee with the accreditation from a language /signing aide agency.

[144] Ai Group submit that it is also unclear whether subclauses 20.10.7(b) and (c) are intended to be requirements that must be met if an employee is to be eligible to receive the entitlement or whether they are obligations that are imposed upon an employee if they are "…required by the employer to use community language skills in the performance of their duties". Ai Group submit the issued has not be addressed by the Unions.

Adjustment of the allowance

[145] Ai Group submit the drafting of clause 20.10.8 raises question about whether the clause is intended to be an expense related allowance. If so, Ai Group submit it is neither clear what expense it could be said to be related to nor has the ASU identified an appropriate adjustment factor for this allowance.

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[58] Ai Group reply submission, 8 April 2019 at [273].

[146] Ai Group responded to the ASU submission on community languages. Ai Group submits that the ASU submissions are highly speculative and not established through limited evidence. They submit that the ASU has made no effort to explain how the variation would recognise the fundamental principles of the ERO and there is no basis for concluding a new obligation on employers to pay employees more to perform duties that many already perform would constitute an efficient or effective use of the limited resources of the sector.

[147] Ai Group submit that the assertion that many people in Australia speak one or more languages other than English and use those languages in their working lives is not properly made out to establish that it warrants special terms and conditions of employment in this sector. They submit that it is not unique to the industries and occupations in the SCHADS Award that in some instances employees may speak or otherwise use a language other than English in the course of their work and this may be of assistance to the employer. Awards do not generally provide additional remuneration to employees in such circumstances.

The ability for employees to speak more than one language is vital to the industry

[148] Ai Groups submit that the ASU evidence on the ability to communicate in more than one language does not enable a proper assessment of the extent to which such skills are utilised across the industry, much less establish that the skills are vital to the industry generally or the extent that it influences recruitment decisions.

[149] Ai Group submit that the NDIS dashboard, which sets out statistics on the operation of the NDIS, states that only 8% of active participants identified themselves as being from a culturally and linguistically diverse background.

[150] Ai Group submit that to some degree the ASU submissions conflate the importance of language skills and understanding and acceptance within a community. Ai Group state that the allowance payment is dependent upon using specific language skills and not broader attributes. They submit that under the ASU proposal an employee that lacks the attributes but possess a rudimentary knowledge of a language other than English would appear to be eligible for the additional payment.

Use of community language skills is not compensated for by the Award or by employers who are constrained by their funding arrangements

[151] Ai Group submit that the SCHADS Award's classification structure cannot be relied on to provide a definitive guide as to what considerations have been taken into account in the setting of rates. They state if the ASU contends that the SCHADS Award does not reflect the value of work undertaken by employees covered by it, the proper course would be to seek an increase to such rates on work value grounds, as contemplated by section s.157 of the Act.
Ai Group submit that the ASU appears to be avoiding a s.157 claim by seeking an all purpose allowance intended to circumvent the limitation on the Commission's capacity to vary minimum wages in the course of the Review that flows from the operation of s.135 of the Act.

[152] Ai Group submit that the Commission should not lightly exercise its discretion to grant the variation in circumstances where such a course of actions appears, on its face, to be squarely at odds with the policy objective underpinning the operation of s.135 and s.157.

[153] Ai Group submit that the extremely limited if not non-existent capacity of employers to meet the costs of the proposed claim is a core reason for Ai Group's opposition to it. The material before the Commission does not establish that any amendment to the modern Award will be a catalyst for change to funding that will enable employers to simply recover any costs imposed upon them.

Use of bilingual employees is preferable to using interpreters

[154] Ai Group refers to clause 20.10.5 that states an employee using community language skills does not replace or substitute for the role of a professional interpreter or translator. They submit that given this provision, the ASU's submissions on the substitutability of bilingual workers and interpreters or translators are of doubtful relevance. They submit in response to the ASU's statement that the government puts the burden of funding interpreters on employers and that it would be open to employers to redirect the funds that they might otherwise spend on interpreters towards the remuneration of bilingual workers in order to secure their services. They submit that this undermines any argument that a variation is necessary to enable employers to reward employees for community language skills.

[155] Ai Group submit that the language allowance may act as a disincentive to the engagement of employees with these skills. Alternatively, an employer faced with such an unrecoverable cost would be rationally expected to limit their exposure to it by directing employees not to engage in activities attracting the payment, unless the employer recognises there to be some greater benefit flowing from the exercise of such skills. Ai Group submit that it is not the role of the safety net of minimum terms and conditions of employment to guide, incentivise or otherwise influence employer decisions around the engagement of interpreters versus bilingual employees.

Additional remuneration will attract skilled employees to the sector

[156] Ai Group submit that the ASU's proposal that the allowance will attract employees to the sector should be rejected. They submit it is not the role of modern awards to intervene in the operation of the labour market so as to encourage the redistribution of labour between sectors.

Section 138 and the Modern Awards Objective

[157] Ai Groups submits there is no detailed evidence dealing with the impact of the claim under s.134(1)(a). They submit that the needs of the low paid will not be assisted if employers elect not to engage employees with community language skills out of a concern that it may expose them to the costs flowing from the proposed new award terms.

[158] Ai Group submit the evidence upon which the ASU intends to rely does not enable the Commission to conclude that the grant of the claim will improve social inclusion through increased workforce participation under s134(1)(c).

[159] Ai Group submit that under s.134(1)(f) the claim would have an adverse impact on business. Significant portions of the industry are dependent on NDIS funding, which does not provide funding for the additional employment costs contemplated by the proposed clause.
Ai Group submits that the material presented by ASU does not enable the Commission to properly measure the extent of the impact of the claim.

(c) Reply submission of ABI

ABI oppose ASU's claim to introduce a community language and signing allowance.

Preliminary issue

[160] ABI comments that in order for the claim to succeed the Commission must, as a threshold issue, be satisfied that the existing wage structure does not already contemplate employees exercising a community language skill.

[161] ABI notes that while the current Award classification structures do not explicitly take into account these capabilities, this does not establish that they do not take them into account. ABI submits that the capabilities in question, i.e. an ability to speak a language other than English, are not new capabilities and may indeed have been considered in the determination of wages in the industry. Further, ABI states the evidence falls short of establishing there has been some proliferation of the requirement to use these skills in the industry.[59]

[162] ABI comments that to the extent this threshold issue can be satisfied, the claim involves the proposition that employees should be compensated for being required to use a particular skill that is not otherwise compensated. ABI submit that there is no explanation as to how the ASU has reached the quantum of the allowances sought, nor sufficient evidence that would allow the Commission to make a proper assessment as to the value of the skill.

Merit basis for variation

[163] In relation to the general rationale for the variation, ABI note that it is not disputed that certain employers will value the ability of an employee to speak a community language other than English is not unique to the SCHADS industry.

[164] ABI further notes that employers in the SCHDS industry value a whole range of different life skills that may not be an inherent part of the particular role. Here, ABI provides the example of employers actively seeking to match workers with consumers who have shared experiences or interests in the home care and disability sectors. ABI submit that a community language skill is just one of a number of life skills that employees may possess.[60]

[165] ABI notes that for the Commission to insert the proposed allowance it must be satisfied the claim does not offend s.138 and submits that, on the evidence before it, the Commission is not permitted to reach that conclusion.

[166] ABI does not consider the requirement to use community language skills to be a widespread part of the industry and believes that a community language allowance is better left to be dealt with at an enterprise level rather than on an industry basis.[61]

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[59] ABI and ors submission, 5 April 2019, [8.7]

[60] Ibid at [8.12]

[61] Ibid at [8.15]

Ambiguity of proposed variation

[167] In addition, the ABI comment that the proposed clause is unclear in a number of respects, including the following:

- the terms "community language skill" at clause 20.10.1 is not defined;
- the purpose and effects of the words "according to when the skills are ued" are unclear;
- it is unclear what work is being referred to by 'such work' at the start of clause 20.10.4 (i.e. it is unclear whether it refers to work contemplated by 20.10.3, 20.10.2 or 20.10.1);
- it is unclear which employees are being referred to by 'such employees' at the start of clause 20.10.5 (i.e. it is unclear whether it refers to employees caught by clause 20.10.3, 20.10.2 or 20.10.1)
- it is unclear whether the purposes of clause 20.10.4 and 20.10.5 are to provide definitions of 'community language skill' or some other purpose; and
- the clause does not state that an allowance is only payable where the employee is 'required by their employer' to use the skill

[168] ABI note that while some of these issues can be rectified, the proposed variation suffers from four additional issues which are less easily resolved.

[169] First, ABI submit that due to the proposed allowance being expressed to apply to employees using a community language skill as an adjunct to their normal duties the proposed variation would require employers and employees to make an assessment as to whether or not a person's language skills are an adjunct to their normal duties, or whether it is a core part of their work. Here, ABI note the following definition of adjunct:

> *'noun* 1. something added to another thing but not essentially a part of it.
> 2. a person joined to another in some duty or service; an assistant.
> 3. *Grammar* a modifying form, word, phrase, etc., depending on some other form, word, phrase, etc.
> 4. *Logic* a non-essential attribute.
> –*adjective* 5. joined to a thing or person, especially subordinately; associated; auxiliary'[62]

[170] Second, ABI submit that it is unclear which allowance is payable, noting that the language allowance in clause 20.10.2 and 20.10.3 requires an assessment as to the frequency of use.

[171] Third, ABI submit there is a lack of clarity as to when the allowance is payable or how it is calculated. For example, ABI asks whether or not an employee who is required to occasionally use a community language skill from commencement is to be paid the allowance immediately and on an ongoing basis or whether it is only payable where the skill is actually used. Further, ABI asks whether the clause requires employers to make an assessment at the end of each pay period and if so over what period of time is assessed.

[62] Ibid at [8.18]

[172] Fourth, ABI asks what happens when the level of usage fluctuates over time between occasional and regular and how often must a review and assessment be made.

Accreditation

[173] ABI submit that the proposed variation should also include a requirement for employees to have their community language skill accredited by an appropriate body as a precondition to receiving the allowance.

[174] ABI notes that clause 20.10.7(a) imposes an obligation on employers to provide the employee with accreditation where their purported skill is required. ABI submits there is no sound basis for the burden of accreditation to be placed on employers. ABI submit that while accreditation should be a precondition of payment, it should be obtained by the relevant employee as it would be unfair for employers to incur costs of sending an employee to obtain accreditation.

Implications of the ASU claim

[175] ABI submit that as the ASU claim proposes to insert a new monetary entitlement, the variation will undoubtedly have an adverse impact on employment costs for a number of employers. ABI state that the extent of the cost imposition cannot be measured due to the lack of evidence before the Commission as to the number of employees who possess community language skills, the proportion of those who use them as an adjunct to their role and the frequency of its use.

Administrative burden

[176] ABI also submit that the proposal would create a significant administrative burden for employers arising out of the need to maintain new records regarding language proficiency and the use of that skill. ABI also submit that processing the proposed allowance would impose administrative complexity.

(d) Reply submission of AFEI

[177] AFEI oppose the ASU claim to introduce a community language allowance. It submits that the allowance is payable irrespective of whether the employer has requested or required the employee to use a language, and in circumstances where the employer has no verification of the employee's actual skill level in the second language.

[178] AFEI disagrees with the ASU claim that employees are not compensated for community language skills because the skill is not contemplated by the classification of awards. AFEI submit that it is unworkable for an award to list every skill associated with the requirements of a particular classification. AFEI submit that since speaking a second language is common and is not a new skill that has developed since the introduction of the modern award, the Commission should not accept the claim.

(e) Reply submission of NDS

[179] With regard to the community language allowance the NDS submit that the employment of bilingual workers to work with CALD communities and clients is a long

standing feature of the sector and there have been no material changes to warrant the introduction into the SCHADS Award of an allowance for this work.

[180] Further they submit that it is a matter that ought to be dealt with in enterprise bargaining. They acknowledge the ASU submission regarding the constraints on bargaining in this sector but claim that in the absence of funding, employers are very constrained in their ability to bargain on this type of matter. They assert that the modern awards objective does not provide for the substitution of bargaining by modern awards.

[181] They submit the ASU has not provided any evidence or reasoning to support the level of payment that is proposed in their draft determination. The cost of the proposed allowance is in the order of about 4-6% of the wage rate for a disability support worker. They submit that in the context of the NDIS which currently sets a capped fixed price for supports, the effect would be to place services that specialise in support for CALD clients at a financial and competitive disadvantage as they will need to absorb between 4-6% on-costs for the relevant employees without the ability to adjust prices.

4.3 HSU claims

[182] The HSU filed submissions and draft determinations seeking a number of variations to the SCHADS Award. It provided witness statements and research papers and reports in support of its claims.

[183] The research papers and reports it filed are as follows:

- Cortis, Natasha, Working under the NDIS: Insights from a survey of employees in disability services (Report prepared for Health Services Union, Australian Services Union and United Voice, June 2017);
- Cortis, Natasha et al, Reasonable, necessary and valued: Pricing disability services for quality support and decent jobs (SPRC Report 10/17, June 2017);
- McKinsey & Company, Independent Pricing Review: National Disability Insurance Agency (Final Report, February 2018)
- National Disability Services, Australian Disability Workforce Report (Report, February 2018)
- National Disability Services, State of the Disability Sector Report (Report, 2018).
- Productivity Commission, National Disability Insurance Scheme (NDIS) Costs (Study Report, October 2017);
- Australian Government Department of Health, The Aged Care Workforce, 2016, March 2017;
- NDIS Price Guide for Victoria, 1 July 2018; and
- NDIS 2018-2019 Price Guide Updates Summary

4.3.1 S6—*First aid certificate renewal*

(a) HSU submission in support of their claim

[184] The HSU seeks to vary the existing first aid allowance to provide for payment of an allowance for first aid certificate renewal and CPR training.[63]

[185] The HSU submits that many employees engaged in disability support or home care roles are required to hold a current first aid certificate in their roles.[64] It further submits that even when not explicitly required, the holding of such qualification is likely to benefit employers as employees are better equipped to deal with a medical emergency. It submits that where an employee is required to maintain their first aid certification, they should be entitled to reimbursement of the costs of maintaining the certification by their employer.

(b) Reply submission of Ai Group

[186] Ai Group oppose the HSU's claim and submits that the changes proposed should not be made. Ai Group submit that the evidence led by the HSU is not probative and does not provide a proper foundation for the imposition of an additional employment cost. The Ai Group claim that there is no evidence or material before the Commission that justifies the proposition that the clause proposed by the HSU is necessary to ensure that the Award achieves the modern awards objective.

[187] They note that the variation proposed is out of step with the current awards system. At attachment A[65] of their submission they analyse current clauses in modern awards that provide employees an entitlement in relation to the provision of first aid. They assert their analysis demonstrates the majority of award provisions provide for a weekly allowance that is calculated as a proportion of the standard rate, and do not afford an entitlement to separate payments regarding costs incurred for the purposes of attending 'refresher' courses, registration fees or time spent attending training. They submit the HSU has not provided any rationale for why an approach so different to the majority of awards should be adopted by the Commission.

[188] They submit that the HSU's submission do not address ss.138 or 134(1) of the Act.

[189] In discussing a fair minimum safety net, firstly the Ai Group submit that the proposed clause is unfair to employers as clause 20.4 of the Award requires the payment of an allowance where the employee is required to "hold a current first aid certificate". Therefore the clause already contemplates the requirements that must necessarily be fulfilled by an employee to hold a current first aid certificate, including any "refresher" training or registration fees. Further, the allowance is payable to an employee regardless of whether the employee in fact administers first aid duties. They submit that the allowance is payable in contemplation of any expenses incurred by an employee in order to hold a current first aid

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[63] HSU Submission, 15 February 2019, [5]

[64] Ibid at [63]

[65] Ai Group submission in reply, 8 April 2019, Attachment A

certificate and the insertion of the additional entitlement proposed by the HSU would amount to double-dipping.

[190] Secondly they submit there is no probative evidence before the Commission that establishes:

> (a) The prevalence of employees covered by the Award being required to retain current first aid certificates;
>
> (b) What (if any) training or refresher training is required in order for an employee to hold a current first aid certificate;
>
> (c) The duration of such training;
>
> (d) The frequency with which such training must be undertaken in order to retain a current first aid certificate (if at all);
>
> (e) The fees payable to attend such training;
>
> (f) Whether the fees payable differ between different training providers;
>
> (g) Any other amounts payable to attend such training; or
>
> (h) The fees payable (if any) to renew or maintain a first aid certificate.

[191] They submit therefore the Commission is unable to quantify the potential costs incurred and it would be unfair to impose a new unquantified financial obligation on employers.

[192] Thirdly they assert that material relied upon by the Unions suggests that some employees are concurrently employed by more than one employer covered by the Award. If both employers required the employee to retain a current first aid certificate, this would appear to grant employees an entitlement to the proposed entitlements twice and claim that such a windfall gain is unjustifiable.

[193] Fourthly they submit that it is unfair that an employer is required to pay for the expenses associated with the relevant training and registration as well as attendance at such training in circumstances where:

> (a) The clause potentially creates an entitlement where the employee perceives that they are required to hold a current first aid certificate, even though they have not been expressly required to do so by their employer;
>
> (b) The clause does not impose any parameters around the training to be undertaken by the employee, the cost of such training or the duration of that training; nor does it afford the employer any ability to determine which training course the employee in fact attends;

(c) The clause does not create an award-derived obligation on an employee to provide evidence of the costs purportedly incurred and/or their attendance at the relevant training; and

(d) The clause does not absolve an employer from the liability created by it in circumstances where the employee does not provide such evidence.

[194] The Ai Group refer to s.134(1)(f) and submit that it is axiomatic that the introduction of a new financial obligation will increase employment costs. The claim, if granted, would therefore have an adverse impact on business.

[195] Further, significant portions of the industry covered by the Award are dependent on NDIS funding. The NDIS does not provide funding for the additional employment costs contemplated by the proposed clause. Employers are not able to recover the additional costs from participants in the scheme because of the pricing caps imposed by the NDIS, nor does the NDIS provide specific funding for first aid refresher training.

[196] Further to this, Ai Group made rudimentary enquiries into first aid courses and found various courses incurring differing fees as well as different providers offering the same or similar courses for different fees. They submit this variability highlights the unfairness and potential employment costs that could amount from the HSU's proposed clause which does not afford employers any discretion or ability to determine which training course an employee attends.

[197] They submit that the impact on businesses of the HSU's claim would be exacerbated as the application of the clause is not restricted to circumstances in which the employee is required expressly by their employer. They further claim that the requirement to pay for or reimburse an employee for "registration" and "expenses" is potentially broad.

[198] Similarly they submit that the clause does not afford the employer any discretion or control over the first aid course attended by the employee and appears to grant an employee complete discretion as to the course they attend and the fees they incur as a result. Also the clause does not require the employee to provide any evidence regarding their purported attendance at first aid training and by extension does not absolve an employer from the obligation to make payment under the clause where an employee does not establish the duration, costs, expenses and whether they did in fact attend the training.

[199] Additionally they submit the clause deems time spent attending "first aid refresher courses" as time worked which has various potential cost implications for the employer including; accrual of paid leave, overtime rates, shift loadings and penalty rates.

[200] In discussing s.134(1)(g) the Ai Group submit that the clause is not simple and easy to understand. They submit that proposed clause 20.5(c)(i) is unclear in the following respects:

(a) Subclauses 20.5(c)(i)(a) and 20.5(c)(i)(b) refer to "registration" and "attendance" costs. Crucially, the clause does not prescribe what those registration or attendance costs must relate to in order to require payment or reimbursement by the employer. We understand from the HSU's submissions that the intention underpinning the clause is that it require payment or reimbursement where an employee is required to maintain a first aid certificate and incurs costs associated with training and/or

registration as a result; however this has not in fact been articulated in the proposed clause.

(b) It is unclear precisely what amounts constitute "the employee's registration and attendance costs". For instance, it is unclear whether the employee incurs costs associated with travelling to and from the training form part of the employee's "attendance expenses" and therefore, must be reimbursed.

[201] Further they submit that the implications of clause 20.5(c)(ii) and treating the time spent at training as time worked are unclear.

[202] Finally they submit the need to ensure a stable system tells against granting the HSU's claim particularly as it lacks proper foundation.

(c) Reply submission of ABI

[203] ABI submitted that the HSU'S first aid allowance claim to vary clause 20.4 should be dismissed.

History of first aid clause

[204] ABI outlined the history of the first aid allowance in the SCHADS Award. When the SCHADS Award was first introduced it included a clause that an employee who holds a first aid certificate and was required by their employer to perform first aid duty at their workplace, would be paid an allowance of 1.67% of the standard rate. The first aid allowance was subject to three variation applications in 2010.

[205] The variation applications raised issues: the clause contained an ambiguity or error in respect of home care employees as it referred to 'at their workplace' in relation to employees in the home care stream, it was intended to apply to situations where employees were required to provide first aid to fellow employees (rather than to customers or clients), the pre-reform awards did not provide a first allowance to home care employees and it is an inherent requirement for the role of a home care employee as part of the certificate III qualification and is already contemplated as part of the classification structure. The clause also did not deal with the issue of pro rata entitlements for part-time and casual employees.

[206] ABI submitted that Watson VP made a decision that the clause contained ambiguities relating to these issues and granted the application to adopt the variation proposed by VECCI. The variation[66] to the first aid allowance stated that the allowance was payable where an employee was required by the employer to be responsible for the provision of first aid to employees employed by the employer and was paid at 1/38th of the full-time allowance for casual and part-time employees.

[207] ASU appealed the variation and following discussions the parties reached a consent position to a variation to the first aid allowance. In the Decision [2010] FWAFB 9880, the Full Bench allowed the appeal and varied the SCHADS Award to include the first aid provision as agreed between the parties.

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[66] PR500495

Rationale for current Award position

[208] ABI submit that it is clear, given the background of the SCHADS Award, that the first aid allowance only applies to employees who are designated as first aid officers in a particular workplace and who may be called on to render first aid to colleagues in the event of an illness or injury. They submit it does not apply to employees required to hold the certification as an inherent requirement of their position or the role may involve rendering first aid assistance.

[209] ABI submit that the rationale for not providing a first aid entitlement to employees who provide support and care to clients is due to the nature of the work and provides an extract of transcript from the hearing before Watson VP[67] to support this claim.

Response to HSU claim

[210] ABI submit that the HSU claim seeks to provide an entitlement to all employees who are required to maintain first aid certification, regardless of whether they are designated first aid officers at their workplace to provide first aid to their fellow employees. They submit that the HSU claim should be dismissed as it is inconsistent with the modern awards system, which does not typically provide allowances in respect of costs borne by employees in maintaining their ability to perform the inherent requirements of their position. ABI referred to the *Nurses Award, Health Professionals* and *Support Services Award, Passenger Vehicle Transportation Award* and *Legal Services Award* as examples of awards where employers are not required to reimburse employees for costs associated with registration, licenses and certificates.

[211] ABI state that many awards do provide a motor vehicle allowance in respect of employees required to use their vehicles in the course of their duties. However, that is a different proposition to compensating employees for the costs associated with holding and maintaining a driver's license in order to allow them to perform the inherent aspects of their role.

[212] ABI submit that as drafted there is nothing preventing an employee from claiming back the costs of first aid certification from multiple employers at the same time, and obtaining a windfall gain that is in excess of the costs incurred by the employee. They submit that even if the clause prevented employees from claiming back the cost from multiple employers that there is question about which employer would be required to pay.

[213] ABI submit that the costs associated with the first aid allowance should not be underestimated as a large number of employers are required to hold a first aid certificate as part of the inherent requirements of their role. They state that these costs will not be able to be passed onto customers, given the regulated nature of the industry, meaning that the variation will have a direct adverse impact on the viability of the industry.

[214] ABI submit that, in the alternative, the Commission introduce a requirement requiring employers to reimburse employees for the time and cost associated with maintaining their first

[67] Transcript, 21 September 2010 at PN36–PN42

aid certification and that it be limited to employees who are designated as first aid officers to provide first aid to fellow employees at their workplace.

(d) Reply submission of AFEI

[215] AFEI oppose HSU's claim concerning the first aid allowance as it would increase costs for employers, and in particular small to medium enterprises. AFEI refer to the Explanatory Memorandum of the Act which recognises the reasonableness of requiring an employee to 'purchase tools' required to perform his or her duties.[68] AFEI submit that where holding and maintaining a first aid certificate is a requirement of the role the employer should not be required by the SCHADS Award to cover this cost. AFEI submit that there is potential that the reimbursement may be disproportionate to the expense associated with the training or renewal.

(e) Reply submission of NDS

[216] The NDS submit the HSU has not provided sufficient evidence of widespread refusal by employers to pay the cost of renewal of first aid certificates. They claim therefore that the HSU's submission regarding first aid certificate allowances should be dismissed.

4.3.2 S43—*Deletion of 24 hour care (NB this is also a United Voice S44A claim)*

(a) HSU submissions in support of claim

[217] The HSU seeks the deletion of the 24 hour care clause from the SCHADS Award.[69] It submits the clause is unclear and rarely used, and that extended periods of care should be dealt with in accordance with other provisions in the SCHADS Award.[70]

[218] The HSU submit the 24 hour care clause leaves employees open to exploitation as:

- it does not compensate employees for the entire time they are required to be available for the performance of duties. In accordance with the principle "*they also serve who only stand and wait*"[71], where an employee is required by the employer, they should be compensated for that as work;
- it does not specify what would happen if an employee works more than 8 hours in a 24 hour period;
- the sleepover clause provides that a sleepover span must be a continuous period of eight hours, and that if an employee's sleep is interrupted and they are required to perform work, they are required to be paid overtime rates;
- there is no provision for the employee to be provided a continuous number of hours for sleep or what happens if the employee's sleep is broken;
- it provides that a bed in a private room will be provided 'where appropriate' but it is not clear when it would not be appropriate for an employee working a 24 hour shift to not be provided with a bed.

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[68] Fair Work Bill (2008), Explanatory Memorandum, at 1292

[69] HSU Submission, 15 February 2019, [5].

[70] Ibid at [64] – [66]

[71] Ibid at [65]

[219] The HSU submit the clause does not meet the modern awards objective and provides for remuneration at a discounted rate during a period where an employee is required to be available for work.

(b) Reply submission of ABI

[220] ABI & NSWBC rely on its submissions provided for at claim 4.1.1.

(c) Reply submission of AFEI

[221] AFEI submits that without 24 hour care shifts people with a disability may need to move away from their family and relocate to a care facility which could lead to serious mental health and behavioural issues.

(d) Reply submission of NDIS

[222] The NDS relies on its submissions provided for at claims 4.1.1.

4.3.3 *S48—Saturday and Sunday work (casual employees receiving casual loading in addition to Saturday and Sunday work)*

(a) HSU submission in support of their claim

[223] The HSU seeks to vary the SCHADS Award to ensure that the casual loading is paid in addition to weekend and public holiday rates.[72] It submits that payment of the casual loading in addition to any overtime, weekend and public holiday penalty is consistent with the function of the casual loading, being to compensate employees for the paid leave entitlements available to permanent employees, and with the "default approach" discussed by the Full Bench in the Penalty Rates Decision.[7374] It submits this approach is simple and easy to understand per s.134(1)(g) of the Act.

[224] The HSU refer to the Full Bench's consideration of the purposes of penalty rates and casual loadings in the context of the *Hospitality Industry (General) Award 2010*[75] and its finding that the casual loading should be added to the Sunday penalty rate because clause 13.1 of the Award makes clear that "*the casual loading is not intended to compensate employees for the disutility of working on Sunday*."[7677] The HSU submit that clause 10.4(b) of the SCHADS Award is "relevantly identical" and that it is clear the casual loading is paid in substitution for the leave entitlements otherwise available to permanent employees, not to compensate for any other aspect of the work or its performance.

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[72] Ibid at [5].

[73] Ibid at [48] – [58]

[74] [2017] FWCFB 1001 at [338]

[75] Ibid at [889] – [891]

[76] Ibid at [895] – [897]

[77] Ibid at [896]

[225] The HSU submit that losing a client or a regular engagement threatens the security of employment and hours of work of casual employees covered by the SCHADS Award and employees take steps to mitigate that risk such as working more than one job in the industry.

[226] The HSU submits the current SCHADS Award clauses 26—Saturday and Sunday work, 28.1(b)(iv) relating to overtime rates for part-time and casual employees and 34.2—Payment for working on a public holiday should not be adopted in their current terms, to the extent that they operate to subsume the casual loading with other penalties. It submits that overtime rates and weekend and public holiday penalties are not designed to compensate casual employees for the loss of leave entitlements and that they should not be denied compensation because they receive a payment due to another feature of the work.

(b) Reply submissions of Ai Group

[227] Ai Group relies on its submissions in 4.1.4.

(c) Reply submission of ABI

[228] ABI oppose HSU's claim to increase the rates of pay payable to casual employees when working on weekends and public holidays by providing that casual loading is payable in addition to penalty rates provided in clauses 26 and 34.2.

Historical background to clause 26

[229] ABI submit that HSU are ignoring the relevant historical background to clause 26 of the Award. ABI notes that two previous decisions of the Commission have involve detailed consideration of the rationale for the current position including a decision made by VP Watson in the course of the 2 yearly review and a decision made by the Full Bench in an appeal against the decision of VP Watson.

[230] ABI states that as a part of the 2 yearly review the ASU sought to delete a clause which would have entitled casual employees to the same penalties provided for full-time and part-time employees working on weekends. In a decision on 27 June 2013 this claim was heard before Watson VP, who determined to vary clause 26 to provide casual employees weekend penalties in lieu of casual loading when working on weekends. The ASU then appealed this decision in respect of these findings. The Full Bench upheld Watson VP's decision. The ABI provided the following comments from the Full Bench decision:

> '[29] In paragraph [33] of the Decision, it is reasonably apparent that Vice President Watson intended that that casual employees should be entitled to the weekend penalty rates for ordinary time work specified in clause 26.1, but that consistent with the approach taken by the Full Bench in paragraph [59] of the *Aged Care Award 2010* decision, those weekend penalty rates should be in substitution for and not in addition to the casual loading. This meant that his Honour intended that the total loading for casual employees should be increased from 25% to 50% for Saturdays and from 25% to 100% for Sundays.
>
> [30] We do not consider that the ASU has succeeded in demonstrating any error in his Honour's consideration of that part of its claim which concerned the working of ordinary hours by casual employees on weekends. Although in paragraphs [30]-[33] of

> the Decision his Honour did not make an explicit finding concerning the weight of regulation in pre-existing awards and instruments, we consider that it is implicit in his Honour's reference to and reliance upon the approach taken in the *Aged Care Award* 2010 decision that he recognised the weight of the pre-existing position but considered that the increase in the casual loading should be regarded as an offsetting factor.
>
> [31] We accept that the ASU was able to demonstrate convincingly that the predominant position in the pre-existing awards and instruments was that casual employees were entitled to penalty rates for working ordinary hours on weekends of the same quantum as those applying to full-time and part-time employees in addition to payment of a casual loading. To the extent that the respondents took issue with the ASU's analysis in this respect, it was largely at the margins and did not serve to alter the main conclusion to be drawn from the analysis. However, it is equally clear that as a result of the adoption of a standard 25% loading for casual employees in modern awards, a large majority of casual employees will upon the completion of the operation of the SCHCDS Award's transitional provisions have received an increase in their casual loading. In the majority of pre-existing awards and instruments, the casual loading had been 20% or less, so that many casual employees will receive a reasonably substantial increase in their ordinary rate of pay (leaving aside weekend penalties) under the SCHCDS Award. In rectifying the omission of weekend penalty rates, we consider that it was open to Vice President Watson, as it was to the Full Bench in the Aged Care Award 2010 decision, to take that matter into account and to award weekend penalty rates that operated to the exclusion of the casual loading. We do not consider that in taking this course, his Honour fell into error in any of the respects identified in paragraph 2.3 of the ASU's appeal notice.'

[231] ABI state that these passages disclose a sound rationale for the current Award position, that is, that the introduction of the Award led to an increase in quantum of casual loading for many employees which was taken into account in determining the appropriate level of remuneration to be payable to casual employees when working on weekends. ABI submit that HSU have not advanced any persuasive argument to warrant a departure from this conclusion.[78]

Public holiday entitlements

[232] ABI submits that while the issue of public holiday rates of pay was not the subject of consideration by VP Watson in the 2 yearly review, the comments made by the Full Bench in the Appeal Decision remain applicable. ABI submits that the fact that the introduction of the Award increased the quantum of casual loading should be taken into account when considering the HSU claim to further increase amounts payable to casual employees working on public holidays.[79]

(d) Reply submissions of AFEI

[233] AFEI made submissions on the HSU and United Voice's claims.

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[78] ABI and ors, submission, 5 April 2019, [10.21]

[79] ABI and ors, submission, 5 April 2019, [10.24]

[234] AFEI submit that the history of the penalty rate provisions for casual employees in the SCHADS Award should be considered. AFEI submit that when the Award took effect in 2010 it provided for neither weekend or overtime penalty rates for casual employees. In March 2014, the Full Bench varied the SCHADS Award in [2014] FWCFB 379 and included clause 26. Clause 26 stated that the casual loading prescribed in clause 10.4(b) was not applicable to overtime hours worked on a Saturday or a Sunday. AFEI referred to the Full Bench's consideration and decision to take a 'conservative approach.'[80]

[235] AFEI submit that there are significant distinguishing features between this case and the *Penalty Rates Decision*. These distinguishing features include that it was primarily an employer claim and a decision resulting in reductions in the Sunday penalty rate for weekly employees and public holiday rates for full-time, part-time and casual employees. The nature of SCHADS funding is also a distinguishing feature due to its widespread reliance on government funding.

[236] AFEI submit that a casual loading in addition to overtime penalties would result in overcompensation where the casual loading is paid in substitution for paid leave entitlements which do not accrue to weekly employees for overtime. AFEI submit that the HSU and United Voice have not provided justification for the departure from the 2014 decision or probative evidence that the award is not meeting the modern awards objective.

(e) Reply submission of NDS

[237] The NDS relies on its submissions provided for at claim 4.1.4.

[80] [2014] FWCFB 379 at [44]