Fair Work Commission: 4 yearly Review of modern awards

SUBMISSION

4 YEARLY REVIEW OF MODERN AWARDS: (AM2018/26)
SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010 - SUBSTANTIVE ISSUES

FILED ON BEHALF OF:

- **AUSTRALIAN BUSINESS INDUSTRIAL**
- **BUSINESS NSW (THE NSW BUSINESS CHAMBER LTD)**
- **AGED & COMMUNITY SERVICES AUSTRALIA**
- **LEADING AGE SERVICES AUSTRALIA**

3 AUGUST 2021

BACKGROUND

1. On 4 May 2021, a Full Bench of the Fair Work Commission handed down a decision concerning the Commission's review of the *Social, Community, Home Care and Disability Services Industry Award 2010* (the **Decision**).[1]

2. In the Decision, the Commission dealt with a range of proposed variations to the *Social, Community, Home Care and Disability Services Industry Award 2010* (the **Award**), including in relation to:

   (a) Minimum engagements;

   (b) Broken shifts;

   (c) Travel time;

   (d) Variations to rosters;

   (e) Remote response work;

   (f) Client cancellation;

   (g) Clothing allowance;

   (h) Overtime for part-time employees;

   (i) 24-hour care;

   (j) Sleepovers;

   (k) Telephone allowance; and

   (l) Community language allowance.

3. The Decision contains a number of provisional views.

4. The Draft Determination, which appears at Attachment P to the Decision (the **Draft Determination**), is said to both give effect to the outcomes of the Decision and also to incorporate the provisional views expressed in the Decision.

THIS SUBMISSION

5. The Commission has invited parties to file submissions and evidence in respect of:

   (a) the provisional views expressed in the Decision;

   (b) the Draft Determination; and

   (c) the proposed operative date for the changes.[2]

6. This submission is made on behalf of Australian Business Industrial, Business NSW (the NSW Business Chamber), Aged & Community Services Australia, and Leading Age Services Australia.

7. We thank the Commission for the opportunity to make this submission.

---

[1] [2021] FWCFB 2383.
[2] See Decision at [1288].

PART A: SUBMISSIONS IN RELATION TO PROVISIONAL VIEWS

BROKEN SHIFTS

8. The Decision contains the following provisional views in relation to broken shifts:

   (a) First, the additional remuneration for working a broken shift under clause 25.6 of the SCHCDS Award should be an allowance calculated as a percentage of the standard weekly rate;

   (b) Second, an employee working a '1 break' broken shift under clause 25.6 should receive a broken shift allowance of 1.7% of the standard rate, per broken shift ($17.10 per broken shift);

   (c) Third, the broken shift allowance payable for a '2 break' broken shift should be set at 2.5% of the standard rate ($35.15 per broken shift); and

   (d) Fourth, an employee who is a day worker performing work outside of the ordinary span of hours (including as part of a period of work in a broken shift) is entitled to overtime for such work.

Standard weekly rate

9. Our clients do not oppose the first provisional view outlined above; that is, our clients accept that it is sensible that a broken shift allowance be calculated as a percentage of the standard weekly rate. This appears to be a simpler formulation to that proposed by our clients (as an alternative position) to address the concerns regarding broken shifts and travel time and the shift penalties that are currently payable on some broken shifts (see Decision at [535] and [550]).[3]

Overtime for day workers working outside the span of hours

10. We also do not oppose the fourth provisional view; that is, that day workers be entitled to overtime for work performed outside the span of ordinary hours. We have, however, proposed some minor amendment to the proposed drafting of the clause in Part B of this submission.

Quantum of the broken shift allowances

11. In relation to the second and third provisional views (regarding the quantum of the broken shift allowance), our clients are not opposed to there being two different allowances for 'one-break' broken shifts and 'two-break' broken shifts respectively. However, we consider that the proposed quantum of the broken shift allowances is too high.

12. Before commenting further on the proposed quantum of the allowances, it is helpful to consider the context in which the issue must be considered.

13. In the Decision, the Full Bench observed that:

   (a) only approximately 18 modern awards permit employers to engage employees on broken shifts;[4]

[3] See Part 9 of our submission dated 13 September 2019.
[4] Decision at [400]-[403].

(b) the 'extent of the regulation of broken shifts' varies between modern awards;[5] and

(c) as a general proposition, the broken shifts clause in the SCHCDS Award is 'less beneficial to employees than the broken shift provisions in a significant number of the' other awards that provide for broken shifts.[6]

14. While we do not cavil with those propositions, in relation to the third point above, it must be noted that in addition to the introduction of a broken shift allowance, the Commission has also determined to introduce other changes to the broken shifts clause which will provide significant additional protections for employees (and which will bring the clause into line with provisions in other awards). These other changes include:

(a) implementing a two-hour minimum engagement for each part of a broken shift for part-time and casual employees in the home care and disability services streams;[7]

(b) limiting broken shifts to consisting of two portions of work (and one break) or, by agreement with an individual employee (on a per occasion basis), three portions of work (and two breaks);[8]

15. In our view, the above changes will go a significant way to ameliorating the issues with the broken shifts clause (such as highly fragmented working patterns and very short shifts). For example, those changes will provide employees with a minimum of four hours' pay when working a 'one break' broken shift. The requirement for employee agreement on a per occasion basis to work 'two break' broken shifts, combined with the two-tier broken shift allowance model, will also drive changed behaviour amongst employers as they will seek to limit broken shifts to 'one break' broken shifts wherever practicable.

16. Turning to the proposed quantum of the broken shift allowances, it is clear that there is huge disparity across the modern award system in terms of the allowances applying in relation to broken shifts. For example, broken shift allowances range from $2.53 per day[9] to $17.18 per day[10], with most being towards the lower end of that range.[11]

17. At [548]-[554] of the Decision, the Full Bench detailed its rationale behind setting the quantum of the broken shift allowances and noted at [552] that the Full Bench had formed the provisional view that the Commission should set the proportion of the standard rate for the allowance 'towards the upper end of the range of other modern awards'.

---

[5] Decision at [404].
[6] Decision at [404].
[7] Decision at [377].
[8] Decision at [488].
[9] *Higher Education - General Staff Award 2020* at C.1.3.
[10] *Children's Services Award 2010* at cl. 15.1.
[11] See for example *Higher Education - General Staff Award 2020*, *Hospitality Industry - General Award 2020*, *Mining Industry Award 2020*, *Cleaning services Award 2020*, *Registered and Licensed Clubs Award 2020*, and *Restaurant Industry Award 2020*.

18. However, when the broken shift payment arrangements across the modern awards system are considered in dollar terms, it appears that the Commission's provisional view on the quantum of the broken shift allowance results in the broken shift allowances in the SCHCDS Award becoming t*he highest* broken shift allowances across the modern awards system.

19. When the recent Annual Wage Review decision is factored in, the Commission's proposed broken shift allowances of 1.7% and 2.5% of the standard rate will lead to broken shift allowances in the SCHCDS Award of:

    (a) $17.53 for 'one break' broken shifts; and

    (b) $25.78 for 'two break' broken shifts.

20. We have not identified any modern award that currently provides a broken shift allowance of this amount. If the Commission's provisional view is affirmed, the SCHCDS Award will become home to the highest broken shift allowance across the entire modern award system.

21. In our clients' submission, there should be a modest adjustment downwards to the proposed broken shift allowances to **1.5% and 2.0% respectively**. In dollar terms, this will result in allowances of:

    (a) $15.47 for 'one break' broken shifts; and

    (b) $20.63 for 'two break' broken shifts.

22. This will provide employees with a reasonable amount of compensation for the disutility associated with working broken shifts, and still result in the allowances being at 'towards the upper end of the range' compared to other modern awards.

23. While our clients accept that the setting of the quantum of the broken shifts allowance requires the exercise of broad judgment, in our submission the proposed amounts are too high.

24. Our clients submit that the amounts proposed by us in paragraph 21 above strike the right balance. It results in an allowance which is towards the upper end of the range relative to other modern awards and provides a fair and reasonable amount of compensation to employees for the disutility associated with working broken shifts. In dollar terms, we consider that allowances of 1.5% and 2.0% respectively strike the right balance between the competing considerations under s.134(1) of the FW Act.

25. In particular, we consider that the *proportional difference* between the two allowances should not be as significant as currently proposed. In our submission, the introduction of a requirement that 'two break' broken shifts can only be worked by agreement with an individual on a per occasion basis means that the 'two break' allowance should not be set as high comparative to the 'one break allowance' as currently proposed.

26. Our clients' proposed allowances of 1.5% and 2.0% respectively reduces the proportional difference between the two allowances for that reason.

27. Lastly, and importantly, our clients' position in relation to the quantum of the broken shift allowances is advanced on the basis that the broken shift allowance has been set to address the disutility

associated with performing work on a non-continuous basis as well as the additional travel time and cost associated with working broken shifts and in place of the currently payable shift penalties.[12]

28. Our clients' position in relation to the broken shift allowance is advanced on the basis that there will not be a further variation to the Award to introduce further entitlements in relation to travel time.

MINIMUM ENGAGEMENTS

29. In the Decision, the Full Bench determined to introduce minimum engagements into the Award for part-time employees and to also increase the existing minimum engagement for casual home care employees from one hour to two hours.

30. At [374]-[376] of the Decision, the Full Bench indicated that it did not propose, at that time, to adopt our clients' proposal for a one hour minimum engagement for attendances at work for:

    (a) staff meetings; and

    (b) training.

31. However, the Full Bench offered our clients an opportunity to present further arguments in support of the proposed change.

32. Our clients maintain that there should be a one hour minimum engagement period for casual and part-time employees in the home care and disability services sectors where employees are required to attend the workplace for training and staff meetings.

33. While we understand the rationale for minimum engagements (i.e. to ensure that the employee receives a sufficient amount of work, and income, for each attendance at the workplace to justify the expense and inconvenience associated with that attendance[13]), we consider it appropriate that there be some reasonable accommodation for staff meetings and the provision of training.

34. The importance of training for personal care workers was something that was highlighted through the Aged Care Royal Commission. By way of example, amongst the recommendations made by the Royal Commission in its Final Report were recommendations that:

    (a) a national registration scheme be established by 1 July 2022 for the personal care workforce which is to include ongoing training requirements;[14]

    (b) the Australian Government should implement by 1 July 2022 a condition of approval of aged care providers that all frontline aged care workers undertake regular training about dementia care and palliative care;[15] and

[12] See Decision at [550] and [535].
[13] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [399].
[14] Recommendation 77, Aged Care Royal Commission Final Report.
[15] Recommendation 80, Aged Care Royal Commission Final Report.

(c) the development of short courses for the aged care workforce be fast-tracked and be designed to 'improve opportunities for learning and professional development' and 'upgrade the skills, knowledge and capabilities of the existing workforce'.[16]

35. Training and development of the frontline home care and disability services workforce (i.e. support workers) is complicated by the nature of the work performed and the logistics involved in coordinating training for employees who in most cases do not work at the same location at the same time.

36. Given the funding constraints affecting the industry[17], our clients are concerned that the foreshadowed implementation of enhanced minimum engagements will have the effect of hampering employer efforts to bolster communication practices with their workforces and invest in learning and development programs.

37. A one hour minimum engagement would alleviate the disincentive that a higher minimum engagement period would otherwise create for employers to hold regular staff meetings and training.

38. We submit that a one hour minimum engagement for casual and part-time employees in the home care and disability services sectors, where employees are required to attend the workplace for training and staff meetings, is an appropriate inclusion in the Award for the following reasons:

(a) employees will obtain the benefit of two hour minimum engagements in respect of their usual work engagements (i.e. the overwhelming proportion of their shifts), which is a significant improvement to the current Award;

(b) staff meetings and training will make up an overwhelming minority of the shifts performed by casual and part-time employees, so on an overall basis it cannot be said that a shorter minimum engagement for what would only be a handful of occasions would be approaching anything that could be considered 'exploitative';

(c) given the high proportion of part-time employment in the home care and disability services sectors (and the fact that the Award has previously not contained any minimum engagement period for part-time employees), we consider that the introduction of a two hour minimum engagement period will likely have the effect of reducing the level of training provided by employers to employees.

39. In our submission, a two hour minimum engagement for casual and part-time employees in the disability and home care sectors may cause employers to determine that it is not commercially viable to hold regular staff meetings, or to provide regular training and development.

[16] Recommendation 80, Aged Care Royal Commission Final Report.
[17] These funding constraints were recognised by the Full Bench in the Decision - see for example Decision at [218].

ROSTER CHANGES

40. The Decision contains a provisional view that clause 25.5(d) of the Award be varied to permit the variation of a roster by mutual agreement to accommodate an agreed shift swap between employees.[18] Our clients are not opposed to that provisional view.

CLIENT CANCELLATION

41. In the Decision, the Commission decided to grant, in part, our clients' claim in relation to the client cancellation clause. The Commission granted our clients' proposed variation subject to two amendments:

    (a) Firstly, the Commission determined to reduce the time period over which make-up time could be worked from 3 months to 6 weeks; and

    (b) Secondly, the Commission expressed the provisional view that the proposed variation should be altered to prohibit employers from utilising the make-up time regime where an employee is not given 12 hours' notice of the cancelled shift.

42. Our clients are opposed to the first of these provisional views.

Period of time in which make up time can be worked

43. Our clients are opposed to the provisional view that the window for arranging make up time be only 6 weeks.

44. As set out in the Decision at [822], our clients had proposed that the client cancellation clause operate such that, where the employer elects to provide make up time:

    (a) the make up time would be required to be rostered in accordance with clause 25.5(a); and

    (b) the make up time would be required to be rostered to be performed within 3 months of the date of the cancelled shift.

45. Our clients' proposal that make up time be rostered in accordance with clause 25.5(a) was put on the basis that make up time could be rostered over a 3 month time window.

46. If the time window is reduced to 6 weeks, we consider that the requirement to roster make up time in accordance with clause 25.5(a) should be varied.

47. The two elements above are interrelated, for the reasons that are explained in the following paragraphs.

48. Clause 25.5(a) provides:

> The ordinary hours of work for each employee will be displayed on a fortnightly roster in a place conveniently accessible to employees. The roster will be posted at least two weeks before the commencement of the roster period.

[18] Decision at [643].

49. If make up time is required to be displayed on a fortnightly roster posted at least two weeks before the commencement of the roster period, a large chunk of the 6 week window will not be available to the employer.

50. We provide the following example of this issue to illustrate the point:

    (a) An employer utilises a fortnightly roster (e.g. 5-18 July, 19 July - 1 August, 2-15 August, etc.);

    (b) A client cancellation event occurs on 6 July 2021;

    (c) As at 6 July 2021, the employer had already published the subsequent fortnightly roster (the roster for the fortnightly period commencing 19 July 2021 had been published on 5 July 2021);

    (d) The employer is not due to publish the next fortnightly roster 19 July 2021 (13 days after the client cancellation event);

    (e) The next fortnightly roster is then published on 19 July 2021;

    (f) As the roster must be published 14 days in advance, the first work day shown on that roster is 2 August 2021.

51. Having regard to the above example, the first day on which the employer could properly roster the employee's make up time is 2 August 2021, some 27 days after the client cancellation event (on 6 July 2021).

52. Therefore, the nominal '6 week' period which the employer has to arrange the employee's make up time is actually only 16 days.

53. As demonstrated by the above example, the requirement for make up time to be rostered in accordance with clause 25.5(a) results in scenarios where the proposed 6 week period does not give employers a reasonable or sufficient period of time to effectively schedule make up time.

54. It should be noted that many frontline disability services and home care workforces consist of predominantly part-time employees, and those workers already have a fixed agreed pattern of work under clause 10.3(c) which cannot be varied without agreement in writing. It may not, therefore, be straightforward to simply find a spare (and appropriate) 'make up' shift within a 16 day window.

55. A range of factors must be considered in offering an employee make up time: the employee's location, the employee's skillset; client needs; client preferences; the employee's availability to work additional make up hours over and above their existing workload, etc.

56. By way of example, if a part-time employee currently works 32 hours per week and has a 5 hour shift affected by a client cancellation event, it may be very difficult for an employer to find a spare 5 hour shift for them to perform in a window potentially as short as 16 days (particularly given the employee already works 32 hours per week).

57. In our submission, the provisional view should not be adopted.

58. There are two ways in which this issue can be addressed:

    (a) Firstly, a 3 month time period could be adopted (as originally proposed by our clients), which would provide a larger (and more reasonable) time window in which the make up time can be worked; or

    (b) Secondly, in the alternative, the requirement to publish make up time shifts on the normal roster in accordance with clause 25.5(a) could be removed and be replaced with the ability to schedule make up time on 7 days' notice (or less by agreement).

59. Our clients submit that the second option above (at (b)) is preferable for both employers and employees and should be adopted.

60. In relation to point (a) above, the Full Bench 'acknowledge[d] the force' of the point made by the UWU as recorded at [813] of the Decision:[19]

> The time within which make-up may be worked should not be three months. Three months is an excessive length of time. The three month time frame will allow larger balances of make-up time to accrue and also greater deficits in remuneration for work performed when make-up time is worked. The current Award clause requires that make-up time must be worked in 'that, or the subsequent fortnightly period'. We propose that the time in which make up can be worked is extended to only the next 2 fortnightly periods i.e. a month. This extension should enable employers to find an appropriate make-up shift for the employee, whilst not being so long as to lose the nexus between the paid shift and the make-up time shift.

61. We acknowledge that a 3 month time window will potentially allow larger balances of make up time to accrue, which in broad terms is not in the interests of employers or employees. We also agree that there is merit in retaining a nexus, as much as possible, between the paid cancelled shift and the make up time shift.

62. In our view, it is in the interests of both employers and employees that make up time be worked as soon after the cancelled shift as practicable.

63. This is why we have reached the conclusion that the idea at paragraph 58(b) is a better solution to the issues we have raised with the 6 week window.

64. In our submission, a 6 week window is not an appropriate time period unless the 'rostering logistics' for make up time are streamlined (i.e. the requirement to roster in accordance with clause 25.5(a) is removed).

65. Under the proposed drafting, the requirement to roster make up time in accordance with clause 25.5(a) has the somewhat anomalous effect that an employee would not be able to work make up time until 15 days after the cancelled shift (at the earliest), and in some cases not until 27 days after the date of the cancelled shift.

[19] Decision at [814].

66. This is a strange outcome which:

    (a) will restrict an employer's ability to schedule make up time in a timely manner;

    (b) is not conducive to assisting employers to organise make up time; and

    (c) extends/weakens the 'nexus' between the cancelled shift and the make up time.

67. The obvious reasonable solution is to remove the requirement to roster make up time in accordance with clause 25.5(a), and to instead allow make up time to be scheduled on 7 days' notice, or such earlier period by agreement with the individual employee (following consultation with the employee as already provided for in the clause).

68. In this regard, it is notable that clause 25.5(d)(i) already provides the employer with an ability to change an employee's roster on seven days' notice.

69. If the current Award already confers a right on employers to change an employee's roster on seven days' notice, it would seem appropriate that an employer should also be able to schedule make up time on seven days' notice in the event of a client cancellation event, rather than having to go through the somewhat clunky process of rostering make up time pursuant to clause 25.5(a).

70. This would enable the employer to have access to a greater proportion of the available 6 week window.

71. Without this amendment to the drafting, the make up time arrangement will be very difficult for employers to utilise in practice.

72. This is a reasonable and sensible adjustment to the proposed drafting and one which should be adopted.

73. If this proposal is not adopted, our clients press for a 3 month time window and maintain that it represents a fair and reasonable time period to give employers a sufficient opportunity to find an available (and suitable) shift and roster make up time.

"Double dipping" issue

74. At [241] of the Decision, the Full Bench noted that our clients were 'to consider the 'double dipping' point' in relation to the client cancellation clause, which was discussed at [825]-[827] of the Decision.

75. In that part of the Decision, the Full Bench considered an issue that had been raised by the ASU about the potential for our clients' proposed client cancellation clause to create a situation where employers could 'double-dip' by receiving income for multiple client services (the initial cancelled service and the subsequent make-up service) while only being required to pay the employee for one shift.

76. Initially, in response to the ASU issue, on 12 October 2019 our clients indicated that they were 'not opposed to a variation to our proposal to explicitly state that the employer may only require an employee to work make-up time where the employer is permitted to charge the client a cancellation fee.'

77. At [827] of the Decision, the Full Bench indicated that this issue could be addressed in the process of finalising the variation determination arising from our decision.

78. Our client has now had an opportunity to consider the 'double dipping' issue in more detail.

79. We no longer consider it appropriate that there be a provision prohibiting the use of the make up time arrangement 'where the employer is permitted to charge the client in respect of the cancelled service'.

80. Under our clients' proposed clause, an employer would not be able to utilise the make up time arrangement 'where the employee was notified of the cancelled shift after arriving at the relevant place of work to perform the shift'.

81. The Commission did not adopt that part of our clients' proposal, and instead has provisionally altered it such that an employer is only able to use the make up time arrangement 'where the employee was notified of the cancelled shift at least 12 hours prior to the scheduled commencement of the shift'.

82. That provisional adjustment materially diminishes the scope for employers to utilise the make up time regime.

83. For that reason, we do not consider it reasonable or appropriate that there be a further limitation on an employer's ability to utilise the make up time regime. In particular, we consider that there are a range of difficulties with the inclusion of a further limitation that is based directly on 'permission to charge' a client in respect of a cancelled shift. Some of these difficulties are outlined as follows.

84. ***Firstly***, there are a range of different funding and pricing regimes applicable to disability services and home care work, such as the NDIS, Home Care Packages, Commonwealth Home Support Programme (CHSP), etc. Each of those programs are structured differently and have different rules around pricing and cancellations. Those structures and rules are also frequently changing and evolving as reforms are implemented. The effect of this is that the Award term would be susceptible to change (and capable of being changed) as a result of changes to government policy.

85. ***Secondly***, we do not consider it appropriate for the Award to include entitlements that are directly linked to government regulation. Such an approach is unconventional in the context of the modern awards system.

86. ***Thirdly***, the notion of 'permitted to charge' introduces a level of ambiguity and uncertainty. By way of example:

    (a) Does the phrase 'permitted to charge' mean permitted by law, in the sense of there being no legal prohibition on the business charging the client, or does the phrase 'permitted to charge' refer to whether the business is permitted to charge under the terms of the particular service agreement between the business and the client?

    (b) Does the phrase 'permitted to charge the client in respect of the cancelled service' mean an ability to charge the *full amount* that the client would have paid for the service, or does it mean an ability to charge *anything* (e.g. a $1 cancellation fee)?

    (c) How does the clause operate in a block-funding setting?

87. Given that the Commission's provisional view involves confining the scope of the make up time regime to circumstances where an employee was notified of the cancelled shift at least 12 hours prior to the

scheduled commencement of the shift, our clients oppose the inclusion of a sub-clause further limiting the operation of the make up time clause by reference to an employer's 'permission to charge'.

88. As the Full Bench has made clear throughout these proceedings, industry funding and pricing regulations are relevant considerations but are not determinative to the Commission's decision-making task. The Commission should therefore resist establishing an award term the scope and operation of which would be uncertain and dependent on government policy making or funding/pricing regulations.

The use of the word 'shift'

89. At [819] of the Decision, the Full Bench held that the use of the word 'shift' in the proposed clause 25.5(f)(v) may require further consideration.

90. We tend to agree with the Commission's concern. Given the incidence of broken shifts in the disability and home care sectors (and the practice of bundling client services into a single shift or portion of work), we consider that the client cancellation clause should be re-drafted to apply not just to a 'shift' but to a 'shift', 'portion of work' or a 'part of a shift'.

91. We propose some amendments to the drafting of the clause in Part C of this submission.

REVIEW OF PART-TIME HOURS

92. In the Decision, the Commission expressed the following two provisional views in relation to the working arrangements for part-time employees:

(a) Firstly, that the Award should be varied to make it clear that working additional hours is voluntary; and

(b) Secondly, that the Award should be varied to introduce a mechanism whereby a part-time employee who regularly works additional hours may request that their guaranteed hours be reviewed and increased, and their employer cannot unreasonably refuse such a request.

93. Our clients do not oppose either of those provisional views. We have, however, proposed some amendment to the proposed drafting of the clause in Part B of this submission.

PART B: THE DRAFT DETERMINATION

94. We thank the Commission for the opportunity to comment on the Draft Determination appearing at Attachment P to the Decision.

95. Our comments below must be read in the context of our submissions on the provisional views as outlined in Part A of this submission, as well as our submissions in relation to the operative date as outlined in Part C of this submission.

96. Having reviewed the proposed drafting of the proposed variations, we propose a handful of modest alterations to the drafting. For the most part, the proposed amendments to the drafting are designed to improve clarity and provide greater precision rather than being an attempt to materially change the effect of the clauses.

97. We outline our comments as follows.

ITEM 1 OF THE DRAFT DETERMINATION

98. As stated at paragraph 93 above, our clients propose a few modest amendments to the drafting of this clause.

99. ***Firstly***, in relation to clause 10.3(g)(i), we consider that a more accurate description of what is being contemplated by 10.3(g) is the increase of an employee's guaranteed hours. The mischief that the clause was designed to address was the act of an employer setting a part-time employee's guaranteed hours at an artificially low level. Therefore, the clause provides a mechanism for employees who regularly work more than their guaranteed hours to make a request to their employer for their guaranteed hours to be increased.

100. Such an agreement to increase an employee's guaranteed hours may not necessarily 'reflect the ordinary hours regularly being worked' by the employee. Nor should it have to. In our view, the Commission should not narrow the ways in which an employer and employee can reach agreement on increased guaranteed hours for the employee. In our view, this wording may have the unintended effect of limiting the operation of the clause.

101. Additionally, we have concerns about the proposed use of the phrase 'ordinary hours'. While we have not considered the issue in great detail, it should not be assumed that the additional hours worked by an employee were 'ordinary hours' within the meaning of the Award.

102. ***Secondly***, in relation to the example appearing immediately following clause 10.3(g)(iii), we propose that the example be bolstered to include some additional scenarios that may provide a reasonable business ground for an employer to refuse a request.

103. While we appreciate that the example might have been adapted from our clients' proposal, having now considered the drafting in more detail it is unnecessary to provide specific examples in relation to the home care sector; those examples are equally applicable to other streams under the Award such as the disability services stream.

104. Additionally, the example of covering an employee who is on annual leave seems unnecessarily confined, and we have proposed that this be amended to 'leave' generally. This would then encompass a broader range of absences such as parental leave, personal leave, unpaid leave, absences on workers compensation, etc.

105. ***Thirdly***, we submit that an additional sub-clause be inserted to confirm that an employee cannot make a request for a review of guaranteed hours where they have refused a previous offer to increase their guaranteed hours in the last 6 months, or where their employer has refused a request from the employee to increase their guaranteed hours based on reasonable grounds in the last 6 months.

106. Our clients' proposed amendments to the wording of clause 10.3(g) are as follows:

(g) Review of guaranteed hours

(i) Where a part-time employee has regularly worked more than their guaranteed hours for at least 12 months, the employee may request in writing that the employer vary the agreement made under clause 10.3(c) to ~~reflect the ordinary hours regularly being worked~~increase their guaranteed hours.

(ii) The employer must respond in writing to the employee's request within 21 days.

(iii) The employer may refuse the request only on reasonable business grounds.

EXAMPLE: Reasonable business grounds to refuse the request may include (but is not limited to): changes to funding arrangements; changes in client numbers and/or preferences; the volatility of working patterns or lack of predictability of working hours; where there is a reasonable basis for anticipating that the additional hours will not be able to be provided on an ongoing basis (for example, where ~~that~~ the reason ~~that~~ for the employee ~~has~~ having regularly worked additional agreed hours is due to a temporary circumstance (~~—~~for example, where ~~this~~ it is the ~~direct result~~consequence of another employee being absent on ~~annual~~ leave). ~~For home care employees, reasonable business grounds to refuse a request may also include the lack of continuity of funding, changes in client numbers and client preferences.~~

(iv) Before refusing a request made under clause 10.3(g)(i), the employer must discuss the request with the employee and genuinely try to reach agreement on an increase to the employee's guaranteed hours that will give the employee more predictable hours of work and reasonably accommodate the employee's circumstances.

(v) If the employer and employee agree to vary the agreement made under clause 10.3(c), the employer's written response must record the agreed variation.

(vi) If the employer and employee do not reach agreement, the employer's written response must set out the grounds on which the employer has refused the employee's request.

(vii) Clause 10.3(g) is intended to operate in conjunction with clause 10.3(e) and does not prevent an employee and employer from agreeing to vary the agreement made under clause 10.3(c) in other circumstances.

(viii) An employee cannot make a request for a review of their guaranteed hours when:

A. The employee has refused a previous offer to increase their guaranteed hours in the last 6 months; or

B. The employer refused a request from the employee to increase their guaranteed hours based on reasonable grounds in the last 6 months.

ITEM 4 OF THE DRAFT DETERMINATION

107. One of the consequences of the introduction of minimum engagements / minimum payments for part-time employees is that some existing part-time employees will currently be working an agreed pattern of work[20] that includes shifts or portions of a broken shift of less than 2 hours' duration. For example, there will be a large number of part-time employees whose agreed pattern of work will include shifts or portions of work of less than 2hours' duration.

108. A natural consequence of the variations to the Award will be that employers will seek to change rosters and patterns of work to ensure, as much as practicable, that employees are being fully utilised for the full 2 hour period whenever they present for work, in order to minimise the circumstances in which they would incur labour costs for unproductive / unchargeable time.

109. However, pursuant to clause 10.3(e) of the Award, an employer cannot change a part-time employee's agreed pattern of hours without the individual employee's agreement. This means that employers may be exposed to situations where a part-time employee does not agree to vary their existing agreed pattern of work to permit the employer to obtain the maximum productive benefit of the time for which they must pay the employee on any shift.

110. It would seem to us that the sensible way to rectify this unintended implementation issue would be to introduce a transitional arrangement whereby, for a defined period of time, the requirements of clause 10.3(e) of the Award would not apply in situations where employers vary a part-time employee's regular pattern of work to increase any shift or portion of work that is less than the applicable minimum engagement / minimum payment period.

[20] The pattern of work will have been agreed in accordance with clause 10.3(c) of the Award.

111. Our clients therefore request that an additional clause be inserted into clause 10.3 of the Award as follows:

> (h) Between the period 1 July 2022 to 30 June 2023, the requirements of clause 10.3(e) do not apply in situations where an employer varies a part-time employee's regular pattern of work to increase any shift or portion of work that is less than the applicable minimum engagement / minimum payment period. Seven days' notice must be given to the employee of the change in their agreed regular pattern of work, and the new pattern of work will become the employee's agreed regular pattern of work within the meaning of clause 10.3(c).

ITEM 8 OF THE DRAFT DETERMINATION

112. For the reasons outlined in Part A of this submission, our clients propose the following amendment to Item 8 of the Draft Determination:

20.10 Broken shift allowance

(a) An employee required to work a broken shift with 1 unpaid break in accordance with clause 25.6(a) will be paid an allowance of 1.5~~1.7~~% of the standard rate, per broken shift.

(b) An employee who agrees to work a broken shift with 2 unpaid breaks in accordance with clause 25.6(b) will be paid an allowance of 2.0~~2.5~~% of the standard rate, per broken shift.

ITEM 9 OF THE DRAFT DETERMINATION

113. We are not opposed to this proposed variation, save that we consider that the Award needs to be made clear that where a roster is changed to accommodate an agreed shift swap between employees, the requirements of clause 10.3(e) do not apply. The drafting at Item 9 of the Draft Determination does not do this.

114. We propose a new clause 25.5(d)(iii) in the following terms:

> (iii) Where a roster is changed under clause 25.5(d)(ii) and this results in a temporary change to a part-time employee's agreed pattern of work under clause 10.3(c), the requirements of clause 10.3(e) do not apply.

ITEM 10 OF THE DRAFT DETERMINATION

115. For the reasons outlined in Part A of this submission, our clients propose the following amendment to Item 10 of the Draft Determination:

(f) Client cancellation

(i) Clause 25.5(f) applies where a client cancels or changes a scheduled home care or disability service, within 7 days of the scheduled service, which a full-time or part-time employee was rostered to provide.

(ii) Where a service is cancelled by a client under clause 25.5(f)(i), the employer may either:

(A) direct the employee to perform other work during those hours in which they were rostered; or

(B) cancel the rostered shift or the affected part of the shift.

(iii) Where clause 25.5(f)(ii)(A) applies, the employee will be paid the amount payable had the employee performed the cancelled service or the amount payable in respect of the work actually performed, whichever is the greater.

(iv) Where clause 25.5(f)(ii)(B) applies, the employer must either:

(A) pay the employee the amount they would have received had the shift or part of the shift not been cancelled; or

(B) subject to clauses 25.5(f)(v) ~~and (vi)~~, provide the employee with make up time in accordance with clause 25.5(f)(vi~~i~~).

(v) The make up time arrangement can only be used where the employee was notified of the cancelled shift (or part thereof) at least 12 hours prior to the scheduled commencement of the ~~shift~~cancelled service. In these cases, clause 25.5(f)(iv)(A) applies.

~~(vi) The make up time arrangement cannot be used where the employer is permitted to charge the client in respect of the cancelled service. In these cases, clause 25.5(f)(iv)(A) applies.~~

(vi~~i~~) Where the employer elects to provide make up time:

(A) the employer must provide the employee with 7 days' notice of the make up shift (or a lesser period by agreement with the employee)~~make up time must be rostered in accordance with clause 25.5(a)~~;

(B) the make up time must be ~~rostered to be performed~~worked within 6 weeks of the date of the cancelled ~~shift~~service;

(C) the employer must consult with the employee in accordance with clause 8A regarding when the make up time is to be worked ~~prior to rostering the make up time~~; and

(D) the make up ~~shift~~ time can include work with other clients or in other areas of the employer's business provided the employee has the skill and competence to perform the work.

(vi~~i~~) Clause 25.5(f) is intended to operate in conjunction with clause 25.5(d) and does not prevent an employer from changing a roster under clause 25.5(d)(i) or (ii).

ITEM 14 OF THE DRAFT DETERMINATION

116. As stated in paragraph 10 of this submission above, we propose that the drafting in respect of the inclusion of overtime entitlements for day workers when working outside the span of hours be amended slightly to aid precision.

117. We propose the following amendment (as indicated by the changes appearing in mark-up/track changes):

> 28.1 Overtime rates
>
> (a) Full-time employees
>
> A full-time employee will be paid the following payments for all work done in addition to their rostered ordinary hours on any day and/or, in the case of day workers, for work done outside the span of hours under clause 25.2(a) ~~(day workers only)~~:

OPERATIVE DATE

118. For the reasons outlined in Part C of this submission, our clients seek a delay to the operative date to not before the first full pay period on or after 1 July 2022.

119. For that reason, we seek a variation to clause B of the Draft Determination that gives effect to a delayed operative date. Our clients would not oppose the following:

> B. This determination comes into operation on ~~1 October 2021~~1 July 2022. In accordance with s.165(3) of the Fair Work Act 2009 this determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after ~~1 October 2021~~1 July 2022.

PART C: THE PROPOSED OPERATIVE DATE

INTRODUCTION

120. Our clients strongly oppose the provisional view expressed by the Commission that the variations should commence from 1 October 2021.

121. We readily accept that the Commission's proposed commencement date (being a period of almost 5 months from the date of the Decision to the date of the changes coming into effect) would, in many other cases, be an entirely reasonable period of notice to industry of an impending change to a modern award.

122. However, a significantly longer transition period is warranted in the present matter, due to a unique combination of important factors, including:

(a) the very challenging operating environment which exists at the present time;

(b) the significance of the changes (both in monetary terms and in relation to impact on operating practices);

(c) the challenges relating to funding; and

(d) the need for businesses to adjust their operating practices, and the time required to allow that to occur.

123. Our clients seek a commencement date of **not earlier than the first full pay period on or after 1 July 2022**.

124. We outline in more detail below the reasons why we consider that a significantly longer transition period than that which has been proposed by the Commission is necessary and appropriate.

CURRENT OPERATING ENVIRONMENT

125. It must be recognised that the impending changes to the Award come at a time when the industry is under significant strain due to a 'perfect storm' of concurrent factors including:

(a) the ongoing COVID-19 pandemic and associated challenges (including the constantly changing public health requirements and the additional costs incurred by providers during outbreaks);

(b) the ongoing *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, which commenced in April 2019 and is scheduled to conclude in April 2022 (**Disability Royal Commission**);

(c) the *Royal Commission into Aged Care Quality and Safety* which took place between October 2018 and March 2021 (**Aged Care Royal Commission**), and the staggered introduction of various regulatory changes by Government in response to the recommendations of the Final Report of the Aged Care Royal Commission;

(d) the constant state of flux in relation to NDIS and home care sector regulation; and

(e) ongoing funding issues for service providers (that have not been resolved by the Government response to the Final Report of the Aged Care Royal Commission, nor the recent changes to the NDIS price regulations).

126. The above issues have created a 'perfect storm' which employers are contending with.

127. Employers are currently grappling with a very dynamic operating environment, where operationally-critical changes are needing to be implemented on a frequent basis as pandemic-related regulations continue to be adjusted on a (virtually) weekly basis.

128. Employers are struggling to manage issues such as the evolving public health requirements, evolving WHS requirements, vaccinations policies, remote working, and client and staff anxieties as they endeavour to continue to deliver important services to vulnerable members of the community. Businesses are stretched.

129. This environment must be taken into account in establishing an appropriate commencement date for these Award changes, particularly given their significance (which we turn to now).

SIGNIFICANCE OF THE CHANGES

130. It must be acknowledged that the changes to be made to the SCHCDS Award arising from the Decision represent very significant changes. Indeed, they are the most significant variations to the Award since its introduction on 1 January 2010. In some cases, the Decision also fundamentally alters well-established and longstanding industrial arrangements that have been in place since well before 2010.

131. The changes are significant in two respects:

(a) Firstly, they will impose significant additional financial cost on employers through the introduction of new and enhanced minimum engagement periods, new allowances, new overtime entitlements, etc.; and

(b) Secondly, they will significantly reduce flexibilities relating to rostering and the allocation of work and will impose substantial additional regulatory burden on employers.

Significant cost increases for employers

132. Short shifts and broken shifts are both fundamental features of the industry. These facts were acknowledged in the Decision, where the Full Bench found that:

(a) "short shifts or engagements are a very common feature in the home care and disability services sectors"; and

(b) "broken shifts are commonly utilised by employers covered by the SCHADS Award and there is a very high incidence of broken shifts in the home care and disability services sectors".[21]

133. Accordingly, it should be uncontroversial that the introduction / expansion of minimum engagements and the introduction of a broken shift allowance are very significant developments. It should also be

[21] Decision at [232].

uncontroversial that these changes to the Award will likely have a material adverse financial impact on a great number of businesses in the disability services and home care sectors.

134. We provide two examples to illustrate the point:

(a) Minimum engagement for part-time home care employees:

Currently, there is no minimum engagement for part-time home care workers in the Award. Accordingly, part-time employees can (and are) rostered to work shifts of 30 minutes' duration. This is not unusual given the nature of home care work (employees attending a client's residence to showering, meal preparation or medication prompting). Such a shift currently attracts an obligation to pay the employee 30 minutes' pay.

When the Award changes come into effect, that shift will require the employer to pay the employee 2 hours' pay. That represents a 300% increase in labour costs.

If the work is undertaken as part of a broken shift, the work would also attract the broken shift allowance of $17.53.

For a Home Care employee at Level 3, pay point 2, this would result in an increase to the required payment from $12.20 to $66.33 for the shift / portion of work.

That represents a **443% increase** in labour costs for that shift.[22]

(b) Broken shift for part-time employees:

Currently, a part-time employee could be rostered to work a broken shift consisting of two portions of work with a duration of 30 minutes each (i.e. a 30 minute period of work, followed by a break, followed by a second 30 minute period of work).

Under the current terms of the Award, the employer is obliged to pay the employee 1 hour's pay.

When the Award changes come into effect, the employer would be required to pay the employee 4 hours' pay (two instances of the minimum engagement) plus a broken shift allowance of $17.53.

For a Home Care employee at Level 3, pay point 2, this would result in an increase to the required payment from $24.40 to $115.13.

That represents a **372% increase** in labour costs for that shift.

135. When one considers the "very common" use of short shifts and the "very high incidence" of broken shifts, the percentage increases in labour costs outlined above suggest that the potential dollar value impact on employers as a result of just these two changes to the Award (minimum engagements and broken shift allowance) is enormous.

[22] This scenario is equally applicable for part-time disability services employees.

136. It is undeniable that the changes represent a very significant alteration to the well-established industrial standards.

137. Further, it is trite that each Award variation will have a cumulative adverse financial impact on employers. For example, there will be employers who will potentially face the following situation when the changes come into effect:

(a) significant labour cost increases where an employer has part-time employees performing shifts of less than 2 hours' duration (due to the introduction of 2 hour minimum engagements for both home care and disability services employees);

(b) labour cost increases of up to 400% where an employer has part-time home care employees working broken shifts consisting of two short periods of work;[23]

(c) labour cost increases of up to 400% where an employer has part-time disability services employees working broken shifts consisting of two short periods of work;[24]

(d) labour cost increases of up to 100% where an employer has casual home care employees working shifts of less than 2 hours' duration;[25]

(e) further significant labour cost increases where an employer has employees working broken shifts (due to the introduction of the broken shift allowance);

(f) further not-insignificant labour cost increases where an employer has day workers working outside the span of hours (due to the introduction of overtime entitlements);

(g) further not-insignificant labour cost increases where an employer has employees performing 'remote response' work (due to the introduction of a remote response payment regime);

(h) further not-insignificant labour cost increases where an employer engages permanent employees to perform home care work and where client cancellation situations arise (due to the changes to the client cancellation clause which will no longer permit an employer to simply cancel a shift without payment to the employee or the provision of make-up time);

(i) further labour cost increases where an employer has permanent employees regularly performing 24 hour care shifts (due to the introduction of an entitlement to an additional week's annual leave); and

(j) further cost increases associated with an obligation to reimburse employees for the reasonable costs associated with the cleaning or replacement of damaged personal clothing.

138. While some of the above individual changes might only result in a modest increase in labour costs for employers (or might not apply to particular businesses), other changes will cause significant cost increases, and the cumulative financial effect of these variations must be taken into account.

[23] See the example at paragraph 134(a) of this submission.
[24] See the example at paragraph 134(a) of this submission, which applies equally to disability services employees.
[25] The minimum engagement for casual home care employees is to be doubled from 1 hour to 2 hours.

139. Further, these cost increases also need to be viewed in the context of other recent Award changes that have resulted in increased employment costs for employers. These other changes include:

(a) Increases to rates of pay for casual employees when working overtime, on weekends and on public holidays, which came into effect from 1 July 2020;[26]

(b) The final instalment of the Equal Remuneration Order for some employees in the social and community services stream which came into effect from 1 December 2020;[27]

(c) The 2.5% increase to rates of pay as a result of the Annual Wage Review decision, which came into effect from 1 July 2021;[28]

(d) The increase to the superannuation guarantee percentage from 9.5% to 10% which came into effect from 1 July 2021; and

(e) Recent changes to the Aged Care Award 2010[29] and the Nurses Award 2010[30], which affects many employers covered by the SCHCDS Award as they also operate residential aged care services and employ nurses.

140. Given the current operating environment and the issues relating to funding (which are addressed below), it is appropriate to give employers a meaningful opportunity to prepare for the introduction of these very significant changes.

Significant additional regulatory burden

141. In addition to the adverse financial impact on employers, they will also face an increased regulatory burden in terms of both implementing the Award changes and administering them on an ongoing basis. By way of example, we note that the following variations will create additional regulatory burden for employers:

(a) The changes to the minimum engagements and broken shifts clauses will require employers to reorganise work and rosters so as to create shifts that comply with the new broken shifts regime;

(b) Where an employer requires or wishes for an employee to undertake a 'two break' broken shift, they will need to obtain the individual employee's consent on each occasion;

(c) The changes to the client cancellation clause will require employers to administer a new 'make up time' regime;

(d) Where an employee requests a review of their part-time working hours, the employer will need to consider that request and respond in a manner consistent with the clause;

[26] See September 2019 Decision and [2019] FWCFB 7096.
[27] See PR525485.
[28] See [2021] FWCFB 3500.
[29] See [2019] FWCFB 7094.
[30] See [2021] FWCFB 115; [2021] FWCFB 4504.

(e) The introduction of a remote response clause will require employers to do a range of things including establishing arrangements for the performance of on-call and remote response work in a manner consistent with the new term;

(f) Employers will need to audit the facilities of any site at which an employee performs a sleepover or 24 hour care shift to ensure the facilities are compliant with the new requirements and, where they are not compliant, organise for the facilities to be made compliant; and

(g) Where 24 hour care shifts are worked, employers will need to procure the agreement of all workers who perform those shifts to ensure compliance with the amended clause.

142. Given the challenging operating environment in which employers currently find themselves, including the financial and resourcing pressures described below, the Commission must give employers a fair and reasonable transitional period to allow these steps to be taken.

FUNDING ISSUES

143. The funding constraints facing the disability services and home care sectors have already been ventilated during the course of these proceedings, including in the written submissions filed by our clients on 5 April 2019, 2 July 2019, 12 July 2019, 19 November 2019, 10 February 2020 and 26 February 2020.

144. The issue of funding was then considered in the September 2019 Decision.[31] In that decision, the Full Bench noted that one of the difficulties that arose in their consideration of the issues was that in March 2019, part-way through the matter (and after the close of evidence), the Federal Government announced changes to the NDIS pricing as part of the NDIA's annual pricing review.[32]

145. Nevertheless, the Full Bench made a number of conclusions in relation to the issue of funding:

(a) Firstly, that the impact of granting claims on business and employment is 'a relevant consideration' but that the funding constraints placed on employers should not 'be given determinative weight';[33]

(b) Secondly, that 'significant unfunded employment cost increases may result in a reduction in services to vulnerable members of the community', however the Full Bench stated that such outcomes are a matter for Government;[34] and

(c) Thirdly, the Full Bench recognised that 'it may take time for a funding arrangement to adapt to a change in circumstances, such as an increase in employment costs occasioned by a variation to the award safety net', and that 'such matters can be addressed by appropriate transitional arrangements'.[35]

---

[31] *4 yearly review of modern awards–Group 4–Social, Community, Home Care and Disability Services Industry Award 2010–Substantive claims* [2019] FWCFB 6067.
[32] See September 2019 Decision at [68]-[75].
[33] September 2019 Decision at [136].
[34] September 2019 Decision at [137].
[35] September 2019 Decision at [139].

146. We agree with, and endorse, the comments of the Full Bench in relation to the fact that there may be a lag between the changes to the Award and equivalent changes to relevant funding arrangements.

147. That will almost certainly be the case in this matter if the changes come into effect on 1 October 2021.

Funding constraints in the home care sector

148. Employers in the home care sector are required to publish pricing information relating to the services they offer, including any administration, case management and exit fees, on the Government's My Aged Care website.[36] Providers are also required to review their pricing information at least once a year. Many businesses update their pricing schedules on an annual basis; many do it on 1 July each year.

149. Home care employers are also required to enter into 'home care agreements' with each client before the provider can start providing services to them.[37] Home care agreements are effectively contractual arrangements with each individual client and must include a copy of the provider's pricing schedule.

150. Importantly, once home care agreements are entered into, the terms cannot be varied without the individual client's agreement. Accordingly, if employers wish to increase their fees in order to mitigate the financial impact of the Award changes, they will need to re-negotiate existing contractual arrangements with each client. There is no guarantee that a client will agree to a variation to their home care agreement which involves a proposed increase to the fees payable for the services.

151. The changes to the Award will most likely necessitate home care providers to seek to renegotiate their existing home care agreements with clients. This will need to be done on an individual basis and will likely take significant time. There is no guarantee that the customer will agree to the change in prices which will leave the employer in a financially difficult position when there is a need to mitigate significant changes in costs to the business.

Lag in funding adjustments for disability services sector

152. Turning to disability services, the sector is subject to price-regulation under the NDIS and the NDIA generally only update the NDIS Price Guide on an annual basis effective from 1 July each year.

153. On 2 June 2021, the NDIA announced that it would update its pricing effective from 1 July 2021. The current price guide (now titled *NDIS Pricing Arrangements and Price Limits 2021-22*) was then published on or around 1 July 2021 and came into effect from 1 July 2021.

[36] See https://www.health.gov.au/initiatives-and-programs/home-care-packages-program/managing-home-care-packages/price-transparency-for-home-care-packages
[37] See https://www.health.gov.au/initiatives-and-programs/home-care-packages-program/managing-home-care-packages/home-care-agreements-for-home-care-packages

154. Notably, the NDIS website currently states:[38]

> ***Next annual pricing review***
>
> *In 2020 we decided to undertake all future annual pricing reviews in the first half of each financial year to better align pricing reviews with provider business and budget cycles.*
>
> *The next Annual Pricing Review is scheduled from August to December 2021, with changes to come into effect 1 July 2022.*
>
> *Providers, please direct queries to your local NDIA Provider Engagement team or email provider.support@ndis.gov.au.* [emphasis added]

155. Therefore, the current position of the NDIA is that it does not intend to adjust the current pricing controls until 1 July 2022.

156. Further, we note that there is ongoing pressure and a strong focus on cost containment within the NDIS scheme, so it should not be assumed that the funding arrangements will be adjusted to account for the impending cost increases for employers.[39] This is a source of anxiety for many businesses in the disability services sector.

157. The Commission must take this regulatory framework into account in setting 'appropriate transitional arrangements'.

158. For the above reasons, it is necessary for appropriate transitional arrangements to be implemented in order to provide time for funding arrangements to adapt so as to soften the blow of the increases in employment costs that will be faced by employers.

Budgetary considerations

159. For many employers impacted by the Award changes, their organisational budgets for the 2021-22 financial year (i.e. 1 July 2021 - 30 June 2022) would have been established during the period April-May 2021. This period coincided with the publication of the Decision.

160. Given that the Decision was handed down on 4 May 2021, and it did not conclusively deal with all issues at that time[40], it is reasonable to infer that most organisations' budgets for FY22 do not take into account cost increases arising from the Decision.[41]

---

[38] See https://www.ndis.gov.au/providers/pricing-arrangements/pricing-updates

[39] See, for example, https://www.afr.com/politics/federal/pm-urges-reform-as-ndis-price-tag-to-hit-26b-and-rising-20210505-p57oz0; https://www.afr.com/politics/federal/disability-scheme-overhaul-flagged-as-canberra-tips-in-another-13-2b-20210510-p57qlg; https://www.theguardian.com/australia-news/2021/apr/13/ndis-cost-cutting-taskforce-told-to-reduce-growth-in-participants-and-spending; https://www.smh.com.au/politics/federal/leaked-laws-reveal-plan-to-kick-australians-off-the-22-billion-ndis-20210325-p57dym.html.

[40] The Decision expressed various provisional views and outlined a process for concluding the proceedings which was anticipated to take place throughout May and June 2021 (with a final decision to be handed down thereafter).

[41] Given the Decision was 300+ pages and involved various complexities, it would not be reasonable to expect that businesses would have even been able to quantify the financial impact of the Decision on their organisation, let alone budget for it for FY22.

161. Further, many employers in this industry are not-for-profit and, in order to obtain funding, are required to strictly adhere to budgets for the financial year. If the Award changes are implemented part-way through a financial year, many businesses will not be able to sustain the increase in monetary costs for the time period between implementation and 1 July 2022.

162. This issue was raised by our clients in the Tranche 1 proceedings in relation to the proposed implementation of increased rates of pay for casual employees on weekends, public holidays and when working overtime.[42] In the Commission's decision of 18 October 2019,[43] the Full Bench accepted the merit of that submission, and observed:

> [31] We also acknowledge that many employers covered by the SCHADS Award are not-for-profit organisations who rely on funding from a range of sources to provide their services. The Survey Results show that almost nine in ten (87.2 per cent) enterprises that responded to the survey receive a significant proportion of their income from the Commonwealth, State or Local Government. Further, we accept that an increase in employment costs within a budget cycle may place such organisations under financial pressure. It is appropriate that a reasonable transition period be determined in order to provide such organisations with an opportunity to seek an increase in funding.

163. Those observations are equally applicable and pertinent in the present matter and, in our submission, should be given greater weight than they were in October 2019 due to the significance of the Award variations and their significant adverse impact on employment costs along with the current operating environment (see paragraphs 125-129 of this submission) that has changed since that time.

164. Publishing the Decision in May 2021 and implementing the changes in October 2021 is unlikely to ameliorate issues arising from employers' budgets and the funding constraints.

BUSINESSES NEED TIME TO ADJUST THEIR OPERATING PRACTICES

165. As stated above, the changes to the Award will have a significant adverse financial impact on many employers, absent some ability on their part to dramatically alter their operating practices before the changes come into effect.

166. In most cases, the foreshadowed changes to the Award will trigger a major review of, and changes to, the operating model of Award-regulated employers in the disability services and home care sectors (and likely also employers covered by enterprise agreements). We address this challenge in more detail below.

167. Unsurprisingly, we understand that the Decision has triggered many Award-regulated employers to audit and review their operations with a view to mitigating the impacts of the Award changes on their enterprises. Of course, this is a prudent and appropriate step for businesses to take.

---

[42] See submission dated 20 September 2019.
[43] [2019] FWCFB 7096.

168. However, these things take time to work through and implement. By way of example, such a process might involve:

(a) First, understanding and quantifying what financial impact the Award changes will have on their organisations (which is in many cases a complex and time-consuming exercise, particularly given it would most likely involve a review of rosters to determine the incidence of broken shifts and shift lengths);

(b) Second, exploring what changes the organisation might be able to make to mitigate the adverse financial impact on it;

(c) Third, assessing the feasibility of implementing those changes (which might involve consideration of a range of organisational, legal or commercial factors including strategy, values/mission, client service, legal/contractual obligations to clients and employees, pricing, overheads, attraction and retention of staff, etc.).;

(d) Fourth, deciding to make certain operational changes; and

(e) Fifth, implementing such changes.

169. Importantly, where employers seek to make adjustments to their operations, the implementation of such changes will in many cases require consultation with employees, clients and other stakeholders and/or the renegotiation of contractual arrangements.

170. A handful of examples can be given to support this point.

171. ***Firstly***, where organisations currently provide services to clients of a short duration (e.g. 30 or 60 minute services, which is very common in the home care sector), the organisation might decide that it is no longer able to viably continue to offer that service. This would then trigger a need to hold discussions with each individual client who is affected with a view to:

(a) reaching agreement with the client for the price of the service to be increased;[44]

(b) reaching agreement with the client for the duration of the service to be increased; or

(c) reaching agreement with the client to alter the time or the day on which the service is delivered (to enable the business to 'bundle' the work with another client service); or

(d) reaching agreement with the client for an alternate support worker to provider the support service.

172. Some changes to client services might then lead to a need to alter the working arrangements of the employees who deliver the service. For permanent employees, this would likely trigger an obligation to consult pursuant to clause 8A of the Award. An employer is also not able to vary a part-time employee's regular pattern of work without their agreement (which must be recorded in writing).

[44] This will usually not be possible in the disability services sector, given the NDIS price regulation.

173. For large businesses with hundreds or thousands of customers and employees, this will be a very significant undertaking.

174. ***Secondly***, employers will also need to vary their practices in relation to broken shifts. This will likely involve:

(a) employers having to change all broken shifts that contain 3 or more breaks (as they will no longer be permitted);

(b) employers will also likely seek to minimise the use of broken shifts, to minimise the financial impact of the obligation to pay a broken shift allowance.

175. These adjustments will similarly require discussions and negotiations (and agreement) with clients and employees.

176. ***Thirdly***, employers may need to adjust their on-call arrangements for dealing with remote response work. This might require consultation, changes to policies/practices, renegotiation of contracts, the creation of new specialist on-call roles, etc.

177. Some of this preparatory and planning/implementation work is hampered by the fact that some of the changes are still expressed as provisional views, and no final decision has been made in respect of those matters. For example, the remote response issue has not yet been finalised, so employers are not able to make operational decisions to support the introduction of the Award term until further clarity is obtained.

Payroll system changes

178. In addition to the review of, and adjustment to, current operating practices, there is also the matter of employers' payroll systems being updated to take into account the Award changes.

179. This is itself a significant piece of work that will take upwards of 6 months to complete. We are instructed that multiple service providers have indicated that they have been informed by their external payroll provider that the Award changes will take around 6 months to build into their system.

180. In this regard, it should be noted that the changes do not simply involve increases to hourly rates of pay or the introduction of new allowances (that would in many cases involve a relatively simple update to payroll systems). Rather, the changes will likely require significant updates to payroll systems. By way of example (without being exhaustive):

(a) Payroll systems will need to be able to accommodate two different broken shift allowances and identify which allowance is payable for each shift worked;

(b) Payroll systems will need to be able to identify how many portions of work are worked in a broken shift in order to apply the correct minimum engagement / minimum payment;

(c) Complexities will arise through the introduction of the client cancellation clause (for example, where alternate work is performed as contemplated by clause 25.5(f)(ii)(A), the payroll system will need to be able to administer the payment rule specified in clause 25.5(f)(iii));

(d) The payment regime and interaction rules for broken shifts under clause 25.6(d) will need to be incorporated;

(e) Other payroll changes will be necessary to reflect changes to the 24 hour care shift, annual leave quantum, etc.

181. Given the significance of the impending variations to the Award, it is appropriate that employers are given a reasonable period of time to implement these adjustments to their operations.

CONCLUSION

182. For the reasons outlined above, the Commission is urged to depart from its provisional view in relation to the commencement date of the changes and determine that the changes should commence from a date not before the first full pay period on or after 1 July 2022.

183. A deferred commencement date is preferable to any transitional / phasing arrangements because:

(a) many of the changes do not easily lend themselves to being phased in (such as the minimum engagements);

(b) there would likely be a degree of complexity associated with any phasing-in arrangements; and

(c) a phasing-in process would likely provide a shorter period of time for employers to prepare for the implementation of the changes.

AUSTRALIAN BUSINESS LAWYERS & ADVISORS
3 August 2021