**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**

**25 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. The Decision dealt with proposed variations to the *Social, Community, Home Care and Disability Services Industry Award 2010* (the **Award**). The Decision included a number of provisional views regarding certain matters.

3. Parties were given an opportunity to file submissions and evidence in relation to those provisional views, and a hearing was then held on 6 August 2021. Two matters were not dealt with during that hearing (remote response and damaged clothing), and a further issue relating to broken shifts arose during the hearing.

4. On 9 August 2021, the Commission published a Statement outlining a process for dealing with those three remaining issues in the matter.[2] Pursuant to that Statement, the Commission granted parties the opportunity to file submissions and evidence on the following three issues:

   (a) remote response;

   (b) damaged clothing; and

   (c) issues relating to broken shifts (as specified in the Statement).

5. This submission is made on behalf of:

   (a) Australian Business Industrial (**ABI**);

   (b) Business NSW (the NSW Business Chamber Ltd) (**NSWBC**);

   (c) Aged & Community Services Australia (**ACSA**); and

   (d) Leading Age Services Australia (**LASA**).

6. Collectively, our clients have more than 900 members that operate a variety of businesses covered by the SCHCDS Award.

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

[1] [2021] FWCFB 2383.
[2] [2021] FWCFB 4863.

**REMOTE WORK**

**Background**

8. During the course of these proceedings and the review of the SCHCDS Award, one of the issues that arose for consideration was how the Award operated in circumstances where an employee, who is not 'at work' or otherwise rostered to work or performing work at a particular time, is contacted and required to undertake certain functions remotely without physically attending a designated workplace.[3]

9. As the Full Bench observed at [648], the Award does not currently directly address work performed outside of ordinary hours that does not require travel to a physical workplace.

10. Two claims were ultimately advanced in respect of this issue at the hearing:

    (a) a proposal by our clients to introduce a new 'remote response' provision to deal with such work, along with consequential amendments to clauses 20.9 (on-call allowance) and 28.4 (recall to work overtime); and

    (b) a proposal by the ASU to vary clause 28.4 (recall to work overtime) to deal with remote response work.

11. Ultimately, the Full Bench did not grant either of the proposals advanced. However, the Full Bench indicated that it was 'necessary to introduce an award term dealing with remote response work' and made a number of general observations about such a term.[4]

12. Those general observations were as follows:

    (a) firstly, a shorter minimum payment should apply in circumstances where the employee is being paid an 'on call' allowance;

    (b) secondly, there is merit in ensuring that each discrete activity (such as a phone call) does not automatically trigger a separate minimum payment;

    (c) thirdly, a definition of 'remote response work' or 'remote response duties' should be inserted into the Award; and

    (d) fourthly, the clause should include a mechanism for ensuring that the time spent by an employee working remotely is recorded and communicated to their employer.

13. The Full Bench observed that the determination of 'an appropriate monetary entitlement for this type of work involves an assessment of the value of the work and the extent of disutility associated with the time at which the work is performed'.[5]

[3] Decision at [647].
[4] Decision at [722].
[5] Decision at [729].

14. The Full Bench also:

    (a) acknowledged the inter-relationship between the concepts of the 'minimum payment period' and the 'rate of payment' that might apply;[6]

    (b) accepted that there is disutility associated with performing remote response work;[7]

    (c) acknowledged that the level of disutility associated with remote response work is less than that experienced by employees who are recalled to a physical workplace or who are 'on call' to be recalled to a physical workplace;[8] and

    (d) rejected the minimum payment proposals advanced by the ASU (namely, a 2 hour minimum payment where the employee is not on call, and a 1 hour minimum payment where the employee is on call).[9]

15. In considering the specific proposals before it, the Full Bench expressed the provisional view that the *minimum payment* for remote response work performed between 6.00am and 10.00pm should be 30 minutes and the minimum payment between 10.00pm and 6.00am should be 1 hour.[10] However, in relation to the *rate* of payment, the Commission expressed the view that the term 'appropriate rate' lacked clarity and gave rise to considerable complexity. The Bench observed that 'a simpler formulation would be preferable'.[11]

**Subsequent agreement between interested parties**

16. On 23 August 2021, with one exception (discussed below), an agreement was reached between a range of interested parties as to the content of a 'remote work' clause, as well as to consequential amendments to existing clauses 20.9 and 28.4 of the Award.

17. The agreement was reached with the following interested parties:

    (a) The Australian Services Union;

    (b) The Health Services Union;

    (c) The United Workers Union;

    (d) Australian Business Industrial;

    (e) The NSW Business Chamber Ltd (trading as Business NSW);

    (f) Aged & Community Services Australia;

    (g) Leading Age Services Australia; and

[6] Decision at [733].
[7] Decision at [730].
[8] Decision at [730].
[9] Decision at [732].
[10] Decision at [733].
[11] Decision at [737]-[738].

(h) National Disability Services.

18. The substance of the agreement is recorded in a Draft Determination that was filed on 23 August 2021 (the **Draft Determination**), and which is also attached to this submission for reference.

19. The abovenamed parties were unable to reach agreement on one discrete element of the clause, being the minimum payment period that should apply where an employee who is on-call performs remote work (as defined) between 10pm and 6am. Otherwise, the abovenamed parties agreed on the content of the Draft Determination.

**The Draft Determination**

20. Save for the resolution of the non-agreed element of the Draft Determination, our clients consider that the remote work proposal as set out in the Draft Determination provides a fair and appropriate regime for the regulation of remote work.

21. Our clients support the making of a 'remote work' clause in the form set out in the enclosed Draft Determination, as well as the making of the consequential amendments also contained in the Draft Determination.

22. We make the following observations in relation to the proposed remote work clause and how it is intended to operate:

(a) The proposed clause 25.10 is intended to regulate circumstances where an employee, who is not 'at work' or otherwise rostered to work or performing work at a particular time, is required to perform work remotely without physically attending a designated workplace.

(b) Clause 25.10 is intended to apply (and is expressed to apply) where an employee is required by their employer to perform 'remote work' as defined by clause 25.10(b).

(c) The term 'remote work' was adopted in favour of 'remote response work', as the word 'response' was considered unnecessary, might not always be an accurate description of the work, and could cause confusion. In any event, the term 'remote work' is a defined term so the label that is used does not have any material impact on the scope of the clause. What is important is the definition rather than the label.

(d) Clause 25.10(b) contains a definition of 'remote work'. In short, the definition is intended to capture circumstances where an employee performs work outside of their normal working hours and away from a designated workplace.

(e) The definition limits the clause to only such work that is performed 'at the direction of, or with the authorisation of, their employer'. This is an important (and appropriate) element and will prevent an obligation to payment being triggered where an employee elects to perform duties outside of their working hours that were not required to be performed (or not required to be performed at that time).

(f) The definition caters for casual employees who might not have 'ordinary' or 'normal' or 'rostered working hours' by incorporating the notion of a 'designated shift' for casuals. We

consider that this language clarifies how the clause applies for casual employees, in that 'remote work' is work that is not part of a casual's 'designated shift'.

(g) The definition also makes it clear that where an employee performs overtime that is contiguous with a rostered shift (e.g. a rostered shift extends past the scheduled finishing time), such work is not 'remote work'.

(h) Equally, the definition makes it clear that where a part-time employee agrees to perform additional hours beyond their agreed pattern of work under clause 10, such additional hours are not 'remote work'.

(i) Those provisions are appropriate safeguards to ensure that agreed additional hours for part-time employees do not lose the benefit of the applicable minimum engagement purely by the work being performed away from a designate workplace.

(j) This definition of 'remote work' is preferred to the definition originally proposed by our clients (which is reproduced at [722] of the Decision). The reason for this is that if a definition is created which is narrow and does not encapsulated all forms of work, it would lead to a situation where uncertainty would remain as to how certain duties that fell outside the definition was to be regulated.

(k) Consideration was given as to whether it was necessary to include a carve-out to the definition of 'remote work' to make it clear that 'remote work' does not include 'the performance of personal tasks that are incidental to maintaining their employment' (including things such as an employee reviewing or managing their own roster, communicating with their employer about their availability for work, or accepting additional hours, calling in sick, etc.). However, the parties to the agreed position formed the view that as such activities do not amount to the 'performance of work' within the general industrial meaning of that phrase, it was unnecessary to include such a carve-out. Certainly, it is not the parties' intention for those incidental activities to constitute 'remote work' or trigger any entitlement under the clause.

(l) Turning to the payment provisions, clause 25.10(c) provides minimum payments or minimum payment periods for remote work. The quantum of the minimum payments depends on:

(i) whether or not the employee is on-call at the time the remote work is performed;

(ii) in the case of employees who are on-call, the time of the day the work is performed; and

(iii) whether the work constitutes participation in staff meetings and/or staff training.

(m) It is proposed that where employees who are not on call perform remote work, the applicable minimum payment will be one hour's pay as set out in clause 25.10(c)(i)(C). This is consistent with the proposal advanced by our clients during the hearing (as reproduced at [659] of the Decision).

(n) Equally, where an employee participates in staff meetings and/or training in circumstances where they are not required to attend a designated workplace, it is proposed that the applicable minimum payment would be one hour's pay as per clause 25.10(c)(i)(D).

(o) Where an employee is on call, the parties have agreed that the minimum payment should be 15 minutes' pay where the work is performed between 6am and 10pm. This is an appropriate minimum payment and reflects the fact that employee is on-call and is being paid the on-call allowance.

(p) The parties have not reached agreement on the applicable minimum payment for remote work performed between 10pm and 6am by employees who are on-call. We address this matter in more detail at paragraphs 36-47 below.

(q) Clause 25.10(c)(ii) provides that where work is performed beyond the applicable minimum payment period, the time worked will be rounded up to the nearest 15 minutes.

(r) Clause 25.10(c)(iii) deals with how the minimum payments operate in circumstances where multiple instances of remote work are performed on any given day.

(s) Clause 25.10(d) deals with the *rate* of payment. The default position that has been adopted is that remote work will be paid at the applicable minimum rate of pay (based on the employee's classification) unless one of the circumstances specified in clauses 25.10(d)(i)(A)-(F) applies.

(t) The scenarios at (A)-(F) reflect the existing rules in the Award. That is, remote work would be paid at a premium rate where:

(i) it is worked outside the span of 6am-8pm;

(ii) it results in an employee working in excess of 38 hours per week or 76 hours per fortnight;

(iii) it results in an employee working in excess of 10 hours per day;

(iv) it is performed on a Saturday, Sunday or public holiday.

(u) We consider those rules around the *rate* of payment to be appropriate and in keeping with the existing rules in the Award.

(v) Clause 25.10(d)(ii) contains interaction rules in respect of the premiums contained in the Award. In short, the rates of pay outlined in clause 25.10(d) will apply in substitution for and not cumulative upon the rates prescribed in clauses 26, 28, 29, and 34. This accords with the general approach adopted in the Award.

(w) Clause 25.10(e) requires an employee to maintain and provide to their employer a time sheet or other record acceptable to the employer specifying the time at which they commenced and concluded performing any remote work and a description of the work that was undertaken. The clause requires employees to provide such records within a reasonable period of time after the remote work is performed. Our clients consider this to be a sensible administrative provision to aid the effective operation of the provision.

(x) Lastly, clause 25.10(f) specifies certain interaction rules regarding clause 25.10. The clause makes it clear that the performance of remote work will not count as work or overtime for the purpose of clauses 25.3, 25.4, 28.3 and 28.5. This has the effect of ensuring that the performance of remote work does not disrupt rostering or prevent an employee from commencing work on the following day as rostered.

23. To facilitate the inclusion of a new 'remote work' provision, a consequential amendment to clause 28.4 has been proposed (and agreed between the abovenamed parties), which serves to clarify that clause 28.4 only applies where an employee 'is recalled to work overtime after leaving the workplace and requested by their employer to attend a workplace in order to perform such overtime work'. In other words, the amendment to the existing clause 28.4 serves to confirm that where an employee performs remote work as defined by clause 25.10, clause 28.4 will not apply. A modest consequential amendment has also been proposed to clause 20.9 of the Award.

**Submissions in support of the Draft Determination**

24. Our clients support the proposal set out in the Draft Determination. We consider that the remote work proposal provides a fair and reasonable minimum safety net of conditions for employees performing remote work. We consider that the agreed position:

(a) is consistent with the observations made by the Full Bench in the Decision of 4 May 2021 at [721]-[722];

(b) adequately resolves the Full Bench's concerns around complexity in terms of the *rate* of pay issue (see [737]-[738] of the Decision); and

(c) meets the modern awards objective.

25. We make some further submissions in respect of the proposed monetary payments contained in the Draft Determination as follows.

*Monetary payments for remote work*

26. In the Decision of 4 May 2021, the Full Bench observed that the determination of an appropriate monetary entitlement for remote response work involves an assessment of the value of the work and the extent of disutility associated with the time at which the work is performed.[12]

27. In relation to the *value of work* performed by employees when undertaking remote work, there was limited evidence before the Commission about the precise nature of the work that is performed by employees away from a designated workplace. However, the evidence tended to suggest that the work is generally of an administrative or operational nature, and includes such tasks as organising rostering, responding to operational queries, and providing phone advice to employees.

28. As a general proposition, the evidence suggested that the value of work undertaken by employees performing 'remote work' is either equivalent to, or less than, the value of the work performed by the relevant employee whilst at work. Certainly, it is doubtful that an employee performing remote work

[12] Decision at [729].

would be expected to perform tasks beyond their skillset or classification level. On that basis, the value of work consideration would support an outcome where employees are paid at the applicable minimum hourly rate for their classification under the Award when performing remote work. The Draft Determination adopts this approach.

29. Turning to the *disutility* associated with remote work, the Full Bench has already determined that:

    (a) the disutility is less than that experienced by employees who are recalled to a physical workplace; and

    (b) the disutility is also less for employees who are not 'on call' as compared to those who are 'on call' to be recalled to a physical workplace.[13]

30. Our clients would add a further point: the disutility associated with remote work is less than that for performing work in the normal manner (i.e. attending work as rostered). This is because employees are not required to get ready for work, get dressed in work clothing, travel to the workplace and travel home. On that basis, the disutility associated with remote work is arguably less than the disutility associated with working a rostered shift.

31. The only disutility associated with remote work is:

    (a) the inconvenience of the prospect of having your leisure time disturbed (if you are on-call);

    (b) the inconvenience of having your leisure time disturbed (if you are required to perform remote work); and

    (c) the inconvenience of being required to perform remote work at unsocial hours (if you are required to perform work at unsocial hours).

32. The disutility at (a) above is appropriately compensated by way of an on-call allowance which is already a feature of the Award. No party sought to increase the quantum of the on-call allowance through the course of these proceedings.

33. The disutility at (b) above is addressed by establishing an appropriate quantum of the payment to be made to an employee for the time spent performing remote work. In this regard, we submit that the extent of the disutility is quite modest by reason of the fact that the work can be performed remotely via phone or email, and employees are:

    (a) not required to attend the workplace to perform the work;

    (b) not required to undertake the other usual incidental tasks associated with attending work (e.g. travelling to/from the workplace, getting dressed and ready for work, incurring travel costs, etc.); and

    (c) in most cases, not required to perform work for more than a very short period of time (e.g. the evidence suggests that most form of remote work involve short phone calls or simple tasks that take a very short period of time to complete).

[13] Decision at [730].

34. The disutility at (c) above is appropriately addressed by providing greater payments during the evening period.

35. Having regard to both the value of work consideration and the disutility consideration, our clients consider that the payment regime provided for in the Draft Determination strikes the appropriate balance.

**The non-agreed element of the Draft Determination**

36. The parties listed at paragraph 17 of this submission have agreed that the minimum payment that should apply to work performed between 6am and 10pm, by employees who are on-call, should be 15 minutes' pay.

37. However, as stated at paragraph 19 above, the parties were unable to reach agreement on what the minimum payment period should be where an employee who is on-call performs remote work between 10pm and 6am.

38. Our clients submit that the appropriate minimum payment for such work should be 30 minutes' pay.

39. We advance the following submissions in support of that position.

40. ***Firstly***, in determining whether to make the Draft Determination that has been put forward, the Commission should place weight on the fact that the Draft Determination has been put forward by agreement between eight interested parties which include the three relevant trade unions as well as five employer/industry associations.

41. ***Secondly***, if the Commission is to endorse the Draft Determination, it must ensure that each of the relevant minimum payments are appropriate and proportionate when they are considered against each other. For example, in determining what the appropriate minimum payment for work performed between 10pm and 6am by employees who are on-call, the Commission should have regard to the fact that the parties are advocating for a 15 minute minimum payment for work performed by on-call employees during 6am - 10pm. The evening minimum payment should therefore be set having regard to the day minimum payment. They should be proportionate with each other.

42. ***Thirdly***, the Commission must assess the relative disutility between remote work performed during 6am-10pm by employees who are on call and remote work performed during 10pm-6am by employees who are on call. Under both scenarios, the employee will be on-call and will be in receipt of the on-call allowance. There is no evidence to suggest the nature of the work would be any different. The only difference is the time at which the work is performed. In our submission, the additional disutility associated with performing remote work during 10pm-6am would not warrant a minimum of more than

twice the daytime minimum payment. This supports setting a minimum payment of no more than 30 minutes.

43. ***Fourthly***, weight must be given to the *rate* of payment that is proposed to apply.[14] Under the proposed clause 25.10(d)(i)(A), the rate of pay for remote work performed between 10pm and 6am will in all cases be no less than 150% of the minimum rate (175% for casuals), and in some cases will be 200% (225% for casuals). This is compared to the rate of payment for daytime remote work which, in the vast majority of cases, will not attract a premium rate and will be paid at the minimum rate.

44. This is a significant factor. When the *rate of pay* is taken into account, under our advocated position, in most cases the position will be:

    (a) remote work performed between 6am-10pm by on-call employees will be attract a 15 minute minimum payment at the minimum rate; compared with

    (b) remote work performed between 10am-6am by on-call employees will be attract a 30 minute minimum payment at 150%.

45. In dollar terms, this results in the minimum payment for 'evening' work being triple the minimum payment for 'daytime' remote work.

46. ***Fifthly***, weight must be also be attributed to the fact that on-call employees will receive the on-call allowance under clause 20.9.

47. For the reasons outlined above, there is no warrant for establishing a minimum payment period of any greater than 30 minutes for remote work performed between 10am-6am by on-call employees.

**Conclusion**

48. The Commission should endorse the Draft Determination that has been advanced on a consent basis by eight of the interested parties (including all three relevant unions) in this matter.

49. The Commission should resolve the non-agreed element of the Draft Determination by setting a 30 minute minimum payment under the proposed clause 25.10(c)(i)(B).

[14] The Commission has already recognised the interrelationship between the rate of payment and the minimum payment period.

**DAMAGED CLOTHING**

50. Parties have had discussions on the content of a clause dealing with damaged clothing, and we understand that a proposal is likely to be filed with support from certain parties. Our clients intend to make submissions in reply on this issue in accordance with the directions.

## ISSUES RELATING TO BROKEN SHIFTS

### Background

51. Pursuant to the Statement of 9 August 2021, parties were given an opportunity to file submissions and evidence in respect of the following matters regarding broken shifts:

(a) The NDS proposal that the first sentence of clause 25.6 of the draft variation determination be amended to read:

> 'This clause only applies to day workers who are social and community service employees when undertaking disability services work and home care employees.'

(b) The NDS proposal that clause 25.6(d) of the draft variation determination be amended to read:

> 'Payment for a broken shift will be at ordinary pay with weekend and overtime penalty rates, including for time worked outside the span of hours, to be paid in accordance with clauses 26 and 28.'

(c) The ASU proposal that clause 25.6(d) of the draft variation determination be amended as follows:

> 'Payment for a broken shift will be at ordinary pay with shift, weekend, public holiday, and overtime, penalty rates to be paid in accordance with clauses 26, and 28, 29 and 34.'

(d) The ASU proposal that, in the absence of a provision for paid travel time, the SCHCDS Award should provide a clear statement that employees must not be required to travel between work locations during their meal breaks and that overtime should be payable until an employee is allowed a meal break free from travel.

52. Before turning to each of the above issues, we consider it necessary to address the apparent conflict between clauses 25.6 and 29.4 of the Award.

### Interaction between clauses 25.6 and 29.4 of the Award

53. A potential controversy has arisen concerning the interaction between the broken shifts clause of the Award (clause 25.6) and clause 29.4. In particular, there appears to be some uncertainty as to whether the broken shifts clause only applies to day workers, or whether broken shifts can be worked by both day workers and shiftworkers.

54. We acknowledge at the outset that there appears to be some tension between clauses 25.6 and 29.4; and that clause 29.4 appears (at first blush) to suggest that shiftworkers cannot work broken shifts. However, we do not consider that clause 29.4, when properly construed, operates to prevent shiftworkers from working broken shifts.

*Proper construction of the Award*

55. In considering this issue, it is necessary to consider the relevant terms of the Award.

56. Part 5 of the Award deals with hours of work and related matters. Part 5 is structured as follows:

    (a) Clause 25 – Ordinary hours of work and rostering;

    (b) Clause 26 – Saturday and Sunday work;

    (c) Clause 27 – Breaks;

    (d) Clause 28 – Overtime and penalty rates;

    (e) Clause 29 – Shiftwork;

    (f) Clause 30 – Higher duties; and

    (g) Clause 31 – Requests for flexible working arrangements.

57. Clause 25 has numerous sub-clauses dealing with the following:

    (a) Clause 25.1 – Ordinary hours of work;

    (b) Clause 25.2 – Span of hours;

    (c) Clause 25.3 – Rostered days off;

    (d) Clause 25.4 – Rest breaks between rostered work;

    (e) Clause 25.5 – Rosters;

    (f) Clause 25.6 – Broken shifts;

    (g) Clause 25.7 – Sleepovers;

    (h) Clause 25.8 – 24 hour care; and

    (i) Clause 25.9 – Excursions.

58. The distinction between day workers and shiftworkers is addressed in clause 25.2. That clause:

    (a) provides that the ordinary hours of work for a day worker will be worked within a specified span of hours; and

    (b) defines a shiftworker as an employee who works shifts in accordance with clause 29 of the Award.

59. Clause 29 deals specifically with shiftwork. Clause 29.1 requires employers who wish to engage an employee in shiftwork to advise the employee in writing, specifying the period over which the shift is ordinarily worked.

60. Although clause 29 deals specifically with shiftwork, there is nothing in the other clauses within Part 5 (clauses 25,26, 27, 28, 30 or 31) that suggests those clauses do not apply to shiftworkers. For example:

(a) most of the provisions in clauses 25, 26, 27, 28, 30 and 31 refer to 'employees' generally, rather than to day workers or shiftworkers;

(b) the term 'employee' is defined in clause 3 of the Award as a 'national system employee within the meaning of the Act', which captures both day workers and shiftworkers;

(c) clause 26 (dealing with weekend penalty rates) specifically contemplates shiftworkers receiving weekend penalty rates (see clause 26.2);

(d) clause 27 deals with meal breaks and tea breaks, and there is nothing to suggest those clauses do not apply to shiftworkers;

(e) there is nothing to suggest the provisions of clause 28 do not apply to shiftworkers – for example, clause 28.1 (dealing with overtime) specifically contemplates shiftworkers receiving overtime rates (see clauses 28.1(a)(v) and 28.1(b)(iv));

(f) there is nothing that suggests clauses 30 and 31 only apply to day workers.

*Application of clauses 25-31 on shiftworkers*

61. Having regard to the above, it appears uncontroversial that clauses 25, 26, 27, 28, 30 and 31 apply to (or are capable of applying to) shiftworkers as well as day workers.

62. Indeed, it would lead to some very strange outcomes if those clauses did not apply to shiftworkers.

63. Turning to clause 25, it also seems uncontroversial that clauses 25.1, 25.2, 25.3, 25.4 and 25.5 apply to both day workers and shiftworkers.

64. The structure of the Award strongly suggests that the provisions of clause 25 apply to both day workers and shiftworkers.

65. When we turn to clauses 25.6, 25.7, 25.8 and 25.9, these clauses are dealing with a specific type of work or shift, namely:

(a) Broken shifts;

(b) Sleepovers;

(c) 24 hour care shifts; and

(d) Excursions.

66. Each of those sub-clauses defines the type of work pattern that the sub-clause applies to and outlines payment provisions for such work. For example:

(a) clause 25.6(a) contains a definition of 'broken shift' and provides a payment mechanism for such shifts;

(b) clause 25.7(a) contains a definition of 'sleepover' and provides a sleepover allowance;

(c) clause 25.8(a) defines what a '24 hour care shift' is and outlines the payment applicable; and

(d) clause 25.9(a) defines what is meant by an 'excursion' and sets out the payment regime.

67. Nothing in the wording of clauses 25.6, 25.7, 25.8 or 25.9 suggests that shiftworkers cannot work broken shifts, sleepovers, 24 hour care shifts or excursions. Certainly, the clauses are not expressed to only apply to day workers.

68. Further, the very nature of the work that those clauses regulate strongly suggests that it was intended and contemplated by the makers of the Award that shiftworkers would (and could) perform such work. For example:

    (a) 24 hour care work necessarily involves a shift that goes beyond the span of ordinary hours for day workers under clause 25.2(a) and the employee working it is appropriately compensated with a 155% penalty on their base rate of pay for all 8 hours worked; and

    (b) sleepovers require employees to stay at the workplace overnight and most likely also perform work outside the span of ordinary hours for day workers under clause 25.2(a);

    (c) broken shifts may require the employee to work outside the span of hours for day workers and instead of payment at overtime rates for working outside the day worker span of hours, the employee is compensated by payment of the appropriate shift penalty based on the time that the shift finishes (clause 25.6(b)).

69. Where an employee regularly performs sleepover shifts or 24 hour care shifts, it would be reasonable to assume that those employees would not be day workers under the Award, as their ordinary hours may not be worked within the span of hours under clause 25.2(a).

70. It would therefore appear highly anomalous if all provisions of clauses 25-31, and all sub-clauses under clause 25, would apply to shiftworkers *except* for clause 25.6.

*Apparent tension between clauses 25.6 and 29.4*

71. Clause 29 provides penalty payments for shiftworkers when working afternoon shifts, night shifts and public holiday shifts.

72. Clause 29.4 is a sub-clause within clause 29. It provides that: 'Shifts are to be worked in one continuous block of hours that may include meal breaks and sleepover.'

73. When one has regard to the structure of the Award, we consider that clause 29.4 simply operates in such a way that afternoon shifts, night shifts and public holiday shifts (as defined in clause 29.2) must be worked in one continuous block and cannot be worked in a non-continuous manner.

74. In other words, in order for a shift to amount to an 'afternoon shift' under the Award, it must be a continuous shift. Therefore, a broken shift which is non-continuous and finishes after 8pm is not an 'afternoon shift'. Instead, it is a 'broken shift' under clause 25.6 and the employee would be paid the afternoon shift penalty for that shift in accordance with clause 25.6(b).

75. No clause of the Award including clause 29.4 states that shiftworkers cannot work broken shifts. Clause 25.6 does not state that broken shifts cannot be worked by shiftworkers. Clauses 25.6 and 29 can sit alongside each other without conflict.

76. Clause 29.4 does not prohibit a shiftworker from working a broken shift under clause 25.6. It simply operates such that:

(a) where a broken shift is worked, clause 29 does not apply and clause 25.6 applies; and

(b) where a continuous shift is worked which finishes after 8pm, it is an 'afternoon shift' and is regulated by clause 29.

**The current situation regarding the apparent conflict between clauses 25.6 and 29.4**

77. Notwithstanding our views on the proper construction of the Award (outlined above), we accept that there is an apparent conflict (or at the very least some tension) between clauses 29.4 and 25.6.

78. An analysis of the Award Modernisation process during 2009-10 leading up to the making of the SCHCDS Award suggests that clauses from various pre-reform awards (some of which contained broken shifts clauses and some of which did not) were combined, and that no detailed consideration was given to how the broken shifts clause sat against the shiftwork clause.

79. Clearly, the apparent tension has not caused any material practical issue over the last 11-plus years. Indeed, the prevailing view of some or all of the interested parties in these proceedings appears to be that:

(a) clause 29.4 does not prevent shiftworkers from working broken shifts;

(b) clause 25.6 operates as an exemption to the general rule in clause 29.4 for home care and disability services employees;[15]

(c) that has been the way in which the Award 'has been applied for 10 years';[16] and

(d) there are 'well-established patterns in the industry of shift workers working broken shifts'.[17]

80. The above views appear to be held by at least both the ASU and the HSU.[18]

81. Certainly, it appears uncontroversial that many employers have applied the Award in the above manner since 2010.

*The proposed resolution of the issue*

82. In our view, the tension between clauses 29.4 and 25.6 can be resolved by a relatively straightforward amendment to clause 29.4 as follows:

29.4 With the exception of social and community services employees when undertaking disability services work and home care employees, shifts are to be worked in one continuous block of hours that may include meal breaks and sleepover.

[15] See Transcript of Conference on 19 August 2021 at PN448-PN451
[16] Transcript of Conference on 19 August 2021 at PN452
[17] Transcript of Conference on 19 August 2021 at PN455
[18] See Transcript of Conference on 19 August 2021 at PN458-PN463.

83. This resolves the apparent conflict in a manner that is consistent with the way in which the Award has been applied and understood by many employers and employees since its introduction.

84. We now turn to the NDS and ASU proposals.

**The NDS proposals**

85. As we understand it, NDS propose that the first sentence of clause 25.6 of the draft variation determination be amended to read:

> 'This clause only applies to day workers who are social and community service employees when undertaking disability services work and home care employees.'

86. For the reasons outlined above, we do not support this proposal advanced by NDS.

87. We are concerned that this proposed amendment would have the effect of prohibiting shiftworkers from working broken shifts (thereby limiting broken shifts to day workers). We do not consider that the Award should only permit day workers to work broken shifts. Such an outcome is:

(a) inconsistent with the proper construction of the existing Award;[19] and

(b) inconsistent with the way in which employers and employees have understood and applied the Award since 2010.

88. This proposed amendment is likely to have significant deleterious implications for a great number of employers and employees. It would likely lead to employers being forced to reorganise the work of shiftworkers (in order to comply with the requirement for shiftworkers hours to be worked on a continuous basis), potentially leading to a reduction in the number of hours that can be offered/given to shiftworkers.

89. Put simply, there does not appear to be any sound merit basis for the Award permitting day workers to work broken shifts but not shiftworkers.

90. For similar reasons, we are also not supportive of the NDS proposal that clause 25.6(d) of the draft variation determination be amended to read:

> 'Payment for a broken shift will be at ordinary pay with weekend and overtime penalty rates, including for time worked outside the span of hours, to be paid in accordance with clauses 26 and 28.'

91. In our view, the amendment is unnecessary. The draft variation determination attached to the 4 May 2021 Decision proposes that clause 25.6(d) read:

> Payment for a broken shift will be at ordinary pay with weekend and overtime penalty rates to be paid in accordance with clauses 26 and 28.

92. In accordance with the provisional view expressed at [234] of the Decision, the draft variation determination contemplates that clauses 28.1(a) and 28.1(b)(iv) will be amended to make it clear that

[19] Refer to [55] - [76] of this submission.

day workers will receive overtime rates when performing work outside the span of hours at clause 25.2(a). On that basis, we do not consider that the additional wording proposed by NDS is necessary.

**The ASU proposal regarding payment for broken shifts**

93. The ASU have proposed that clause 25.6(d) of the draft variation determination be amended as follows:

> 'Payment for a broken shift will be at ordinary pay with shift, weekend, public holiday, and overtime, penalty rates to be paid in accordance with clauses 26, and 28, 29 and 34.'

94. We agree *in part* to the ASU proposal.

95. We are not opposed to clause 25.6(d) of the draft variation determination being amended to include a reference to public holiday penalty rates under clause 34. In this regard, we are not opposed to clause 25.6(d) reading:

> Payment for a broken shift will be at ordinary pay with weekend, public holiday, and overtime penalty rates to be paid in accordance with clauses 26, 28 and 34.

96. However, we oppose the inclusion of shift loadings under clause 29 being payable.

97. In the Decision, the Commission determined that the existing payment mechanism at clause 25.6(b) would be replaced with a new broken shift allowance.[20] On that basis, the ASU proposal is inconsistent with the Decision, as they seek to require employers to pay both a broken shift allowance and a shift loading under clause 29. This proposal goes beyond the outcome of the Decision.

98. We intend to deal with this issue in more detail in our reply submissions.

**The ASU proposal regarding travelling and meal breaks**

99. The ASU have proposed that the Award should be varied to include a clear statement to the effect that:

(a) employees must not be required to travel between work locations during their meal breaks; and

(b) overtime should be payable where such activity occurs until such time as an employee is allowed a meal break free from travel.

100. We intend to deal with this issue in our reply submissions.

**AUSTRALIAN BUSINESS LAWYERS & ADVISORS**
**25 August 2021**

[20] Decision at [554].

# DRAFT DETERMINATION

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

## 4 YEARLY REVIEW OF MODERN AWARDS – SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

(AM2018/26)

XXXX
XXXX
XXXX

XXXX, XX XXXX 2021

*4 yearly review of modern awards – Social, Community, Home Care and Disability Services Industry Award 2010.*

A. Further to the decision issued on XXX in AM2018/26 ([2021] FWCFB XXXX), the above award is varied as follows:

1. By inserting a new clause 25.10 as follows:

**25.10 Remote work**

(a) This clause applies where an employee is required by their employer to perform remote work.

(b) For the purpose of this clause, **remote work** means the performance of work by an employee at the direction of, or with the authorisation of, their employer that is:

(i) not part of their rostered working hours (or, in the case of casual employees, not a designated shift); and

(ii) not additional hours worked by a part-time employee under clause 28.1(b)(iii) or 10.3(e) or overtime contiguous with a rostered shift; and

(iii) not required to be performed at a designated workplace.

**(c) Minimum payments for remote work**

(i) Where an employee performs remote work they will be paid for the time spent performing remote work, with the following minimum payments applying:

A. where the employee is on call between 6.00am and 10.00pm – a minimum payment of 15 minutes' pay;

B. where the employee is on call between 10.00pm and 6.00am – a minimum payment of [to be determined];

C. where the employee is not on call - a minimum payment of one hour's pay;

D. where the remote work involves participating in staff meetings or staff training remotely - a minimum payment of one hour's pay.

(ii) Any time worked continuously beyond the minimum payment period outlined above will be rounded up to the nearest 15 minutes and paid accordingly.

(iii) Where multiple instances of remote work are performed on any day, separate minimum payments will be triggered for each instance of remote work performed, save that where multiple instances of remote work are performed within the applicable minimum payment period, only one minimum payment period is triggered.

**(d) Rates of pay for remote work**

(i) Remote work will be paid at the minimum hourly rate unless one of the following exceptions applies:

A. Where remote work is performed outside the span of 6am-8pm, it will be paid at the rate of 150% for the first two hours and 200% thereafter or, in the case of casual employees, at 175% for the first two hours and 225% thereafter;

B. Where the remote work results in an employee working in excess of 38 hours per week or 76 hours per fortnight, it will be paid at the applicable overtime rate prescribed in clause 28.1;

C. Where the remote work results in an employee working in excess of 10 hours per day, it will be paid at the rate of 150% for the first two hours and 200% thereafter;

D. Where remote work is performed on Saturdays, it will be paid at the rate of 150% or, in the case of casual employees, 175%;

E. Where remote work is performed on Sundays, it will be paid at the rate of 200% or, in the case of casual employees, 225%;

F. Where remote work is performed on public holidays, it will be paid at the rate of 250% or, in the case of casual employees, 275%.

(ii) The rates of pay in clause 25.10(d)(i) above are in substitution for and not cumulative upon the rates prescribed in clauses 26, 28, 29, and 34.

**(e) Other requirements**

An employee who performs remote work must maintain and provide to their employer a time sheet or other record acceptable to the employer specifying the time at which they commenced and concluded performing any remote work and a description of the work that was undertaken. Such records must be provided

to the employer within a reasonable period of time after the remote work is performed.

**(f) Miscellaneous provisions**

The performance of remote work will not count as work or overtime for the purpose of the following clauses:

(i) Clause 25.3 - rostered days off;

(ii) Clause 25.4 - rest breaks between rostered work;

(iii) Clause 28.3 - rest period after overtime;

(iv) Clause 28.5 - rest break during overtime.

2. By deleting clause 20.9 and inserting in lieu thereof:

**20.9 On call allowance**

An employee required by the employer to be on call (i.e. available for recall to duty at the employer's or client's premises and/or for remote work) will be paid an allowance of:

(a) $20.63 for any 24 hour period or part thereof during the period from the time of finishing ordinary duty on Monday to the time of finishing ordinary duty on Friday; or

(b) $40.84 in respect of any other 24 hour period or part thereof on a Saturday, Sunday, or public holiday.

3. By deleting clause 28.4 and inserting in lieu thereof:

**28.4 Recall to work**

An employee who is recalled to work overtime after leaving the workplace and requested by their employer to attend a workplace in order to perform such overtime work will be paid for a minimum of two hours' work at the appropriate rate for each time recalled. If the work required is completed in less than two hours the employee will be released from duty.

B. This determination comes into operation from XX XXXX 2021. In accordance with s.165(3) of the *Fair Work Act 2009* these items do not take effect until the start of the first full pay period that starts on or after XX XXXX 2021.

[Insert the Seal of the Fair Work Commission]

XXXX