

BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009 (Cth)

Title of matter: 4 yearly review of modern awards—Social, Community, Home Care and Disability Services Industry Award 2010

Matter Number: AM2018/26

Document: Submissions pursuant to Fair Work Commission Statement dated 9 August 2021

Date: 25 August 2021

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Background

1. For the purposes of these submissions, the *Social, Community, Home Care and Disability Services Industry Award 2010* shall be referred to as the '**SCHADS Award**'.
2. AFEI filed written submissions dated 3 August 2021 in these proceedings ('**3 August 2021 submissions**').
3. On 9 August 2021, the Fair Work Commission (the '**FWC**') issued a Statement ('**the Statement**').
4. Paragraphs 5 and 6 of the Statement provides:

[5] During the course of the proceedings on 6 August 2021 a broad consensus emerged that aspects of the broken shift issue could not be determined to finality on that day; we agree.

[6] The following matters in respect of the broken shift issue are to be the subject of a further opportunity to file submissions and evidence:

1. 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.'
2. 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.'
3. 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.~~'
4. The ASU proposal that, in the absence of a provision for paid travel time, the SCHADS 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. ² The ASU has filed a [draft determination](#) in respect of this issue.

5. The FWC invites submissions and evidence in respect of the issues as set out at (our) paragraph [4] above, and in respect of remote response and damaged clothing.
6. These submissions are in response to (our) paragraph [5] above.
7. AFEI has had an opportunity to review the further submissions of the Australian Industry Group ('**AiG**') filed with the FWC on 25 August 2021 ('**AiG further submissions**').
8. AFEI supports and adopts the AiG further submissions but wishes to raise the following points.

Broken Shifts

9. In relation to paragraph 62 of AiG further submissions, and for reasons of clarification, AFEI also say:
 - a. AFEI disagreed that the quantum of the broken shift allowance should be set towards the upper end of the range of other modern awards;¹

¹ Paragraphs [50-53] AFEI 3 August 2021 submissions.

- b. our 3 August 2021 submissions noted the FWC determination that the broken shift provision in the Award (clause 25.6) is to be replaced with a new provision that, amongst other things, removes the reference to clause 29-shiftwork;²
 - c. it is in this context that the AFEI recommended that the broken shift allowances should be:³ 1.3% of the SWR for a broken shift with 1 break; and 2.0% of the SWR for a broken shift with 2 breaks;
 - d. since the date of filing the 3 August 2021 submissions, it has become apparent that the regulation of broken shifts for shift workers has become a live issue;⁴
 - e. AFEI support the AiG where they contend that “the broken shift allowances should be even less if they are to apply in addition to the shift allowances”.⁵
10. In paragraph 63 of AiG further submissions, AiG refers to submissions filed by United Workers Union on 3 August 2021 (**‘UWU submissions’**), specifically paragraph 22 of the UWU submissions.
11. Paragraph 22 of the UWU submissions contain a table of multiple awards which appears to address the question of whether employees covered by the named awards are entitled to both the broken shift allowance and shift loading/penalty rate (if one would ordinarily apply) (**‘UWU’s table’**).⁶
12. Attached at **Annexure A** to these submissions is a detailed analysis of the UWU’s table. AFEI notes as follows:
- a. UWU submits that both broken shift allowance and shift loading would apply to employees covered by the Fitness Industry Award 2020. This is incorrect. The Fitness Industry Award does not contain shift work loadings.
 - b. Broken shift allowances in the following Awards are lower (in some cases, substantially lower) than the allowance in the draft determination⁷:
 - i. *Higher Education-General Staff – Award 2020;*
 - ii. *Hospitality Industry (General) Award 2020;*
 - iii. *Mining Industry Award 2020;*
 - iv. *Cleaning Services Award 2020;*
 - v. *Registered and Licensed Clubs Award 2020;*
 - vi. *Animal Care and Veterinary Services Award 2020.*
 - c. Shift loadings in the following Awards are not paid across the entire shift worked by the employee (unlike the SCHADS Award):
 - i. *Hospitality Industry (General) Award 2020;*
 - ii. *Security Services Industry Award 2020;*
 - iii. *Registered and Licensed Clubs Award 2020*
 - iv. *Restaurant Industry Award 2020;*
 - v. *Children’s Services Award 2010.*

² Paragraph [48], AFEI 3 August 2021 submissions.

³ Paragraph [53] AFEI 3 August 2021 submissions.

⁴ Transcript of Proceedings AM2018/26 dated 6 August 2021 PN180-PN314.

⁵ AiG further submissions at paragraph 62.

⁶ The table at paragraph 22 of the UWU submissions is repeated at paragraph [73] of the FWC’s Summary of Submissions dated 5 August 2021.

⁷ FWC draft determination dated 4 May 2021.

- d. the span of hours in the following Awards are longer than under the SCHADS award (and the broken shift allowance is less than the amounts proposed by the FWC in the draft determination in the SCHADS Award):
 - i. *Fitness Industry Award 2020*;
 - ii. *Animal Care and Veterinary Services Award 2020*.

Travel during a meal break

- 13. AFEI notes the draft determination filed by the Australian Services Union dated 9 August 2021, in particular the proposed clause 27.3 'Travel during meal and tea breaks'.
- 14. It is unclear to what extent the ASU's proposal is necessary in the light of the FWC's determination to:
 - a. introduce a 2 hour minimum payment period to apply to each part of a broken shift;⁸
 - b. vary clause 25.6 to:
 - i. limit a broken shift to 2 separate periods of work with a single unpaid 'break';
 - ii. allow for a maximum of 2 unpaid 'breaks' subject to employee agreement;
 - c. payment of broken shift allowance with a 2 break shift to be subject to a higher payment than that payable for a 1 break shift;
 - d. clause 25.6 to be varied to make clear that where a break in work for an employee (whether it be travel time or 'dead' time) falls within a minimum payment period, then it is to be counted as time worked and does not constitute a break in the employee's shift.
- 15. Nevertheless, AFEI reserves its right to make further submissions on this matter should the ASU file submissions providing further clarity on their proposal.

Remote Response

- 16. On 23 August 2021:
 - a. AFEI was notified by Australian Business Lawyers and Advisors ('ABLA') of an apparent agreement reached on the remote response provision⁹ with all interested parties in these proceedings with the exception of the AiG and AFEI ('the apparent agreement'); and
 - b. ABLA filed with the FWC a draft determination reflecting the apparent agreement.
- 17. AFEI notes, from communication filed with the FWC by ABLA, that parties to the apparent agreement intend to file submissions in relation to the apparent agreement.
- 18. On the basis that AFEI was not a party to the apparent agreement, AFEI reserves its position in respect of this matter and anticipates filing submissions responding to the apparent agreement upon consideration of submissions to be filed as indicated above, by 30 August 2021 in accordance with paragraph 7 of the Statement.

Damaged Clothing

⁸ [2021] FWCFB 2383 [475].

⁹ With the exception of one element being the minimum payment period that should apply where an employee who is on-call performs remote work between 10pm-6am.

19. The FWC determined that an award variation is warranted to provide for the reimbursement of reasonable costs associated with the cleaning or replacement of personal clothing which has been soiled or damaged in the course of employment and directed interested parties to confer about the form of a suitable variation based on views expressed by the FWC.¹⁰
20. AFEI notes a proposed variation in relation to damaged clothing filed with the FWC by the AiG on 25 August 2021.
21. AFEI supports the proposed variation at [20] above.

25 August 2021

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¹⁰ [2021]FWCFB2383 at [882] and [890].

Annexure A: AFEI analysis of the table at paragraph 22 of UWU submissions

<u>Award</u>	<u>Broken Shift allowance</u>	<u>Do employees receive both the broken shift allowance and shift penalties?</u>	<u>Comments</u>
<i>Higher Education- General Staff – Award 2020</i>	Schedule C \$2.53 – per day (0.28% of the standard rate) \$12.46 – per week (1.38% of the standard rate)	Yes	Broken shift allowance is substantially lower than the allowance in the draft determination
<i>Hospitality Industry (General) Award 2020</i>	Clause 26.14 \$2.90 – per day where the period between shift is between 2 and 3 hours; and \$4.39 – per day where the period between shifts is more than 3 hours.	Yes	Broken shift allowance is much lower than allowance in the draft determination Clause 29.2 Late night/early morning loadings are paid per hour or per part hour only on the hours worked between 7:00pm and 7:00am. That is, loadings are not paid across the entire shift.
<i>Mining Industry Award 2020</i>	Clause 18.2(d)(iii) \$9.62 – per week	Yes	Broken shift allowance is substantially lower than the allowance in the draft determination.
<i>Security Services Industry Award 2020</i>	Clause 17.4 \$14.71 – per rostered shift	Yes	Broken shift allowance is lower than allowance in the draft determination As per the example provided in clause 17.4, shift loadings are only payable on the portion of the shift that falls within the shiftwork hours.
<i>Cleaning Services Award 2020</i>	Clause 17.2 \$3.78 – per day \$18.89 – per week (maximum)	Yes	Broken shift allowance is substantially lower than the allowance in the draft determination

<u>Award</u>	<u>Broken Shift allowance</u>	<u>Do employees receive both the broken shift allowance and shift penalties?</u>	<u>Comments</u>
<i>Registered and Licensed Clubs Award 2020</i>	<p>Clause 19.2</p> <p>\$3.51 - per day per each broken work period</p>	Yes	<p>Broken shift allowance is substantially lower than allowance in the draft determination</p> <p>Clause 24.4 provides that late and early loadings are only payable on the portion of the shift that falls within the specified hours.</p>
<i>Fitness Industry Award 2020</i>	<p>Clause 17.2</p> <p>\$14.16 – per day and extra \$1.95 excess fares allowance</p>	No	<p>The Fitness Industry Award does not contain shiftwork loadings. Further, it should be noted that the span of hours under the award are (clause 13.1):</p> <p>5:00am – 11:00pm Monday to Friday 6:00am – 9:00pm Saturday and Sunday</p>
<i>Animal Care and Veterinary Services Award 2020</i>	<p>Clause 16.2</p> <p>\$14.39 - per shift</p>	Yes	<p>Broken shift allowance is substantially lower than allowance in the draft determination</p> <p>Further, it should be noted that the span of day work hours under this award are (Clause 13.2):</p> <p>6:00am – 9:00pm Monday to Sunday</p>
<i>Restaurant Industry Award 2020</i>	<p>Clause 21.3</p> <p>\$4.39 for each separate period of work of 2 hours or more</p>	Yes	<p>Broken shift allowance is substantially lower than allowance in the draft determination</p> <p>Clause 24.2 provides that late night/early morning loadings are only payable on the portion of the shift that falls within the penalty hours.</p>

<u>Award</u>	<u>Broken Shift allowance</u>	<u>Do employees receive both the broken shift allowance and shift penalties?</u>	<u>Comments</u>
<i>Children's Services Award 2010</i>	Clause 15.1 17.18 per day	Yes	Clause 15.1 provides that a broken shift is comprised of 2 separate shifts in a day. Consequently, shift penalties would only be payable on the shift attracting the shift penalty.