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**Sent:** Wednesday, 13 November 2019 4:40 PM

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**Subject:** RE: AM2018/26 - Social, Community, Home Care and Disability Services Industry Award 2010

Dear all,

Please find attached the joint position of the United Workers Union (as United Voice is now known) and the Health Services Union in response to ABI's proposed clause and our updated proposed clause.

Warm regards,

**Natalie Dabarera**  
National Industrial Officer  
**United Workers Union**

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***AM2018/26 - 4 yearly review of the Social, Community, Home Care and Disability Services Industry Award 2010***

**JOINT POSITION OF UNITED WORKERS UNION AND THE HEALTH SERVICES UNION ON CLAUSE 25.8 '24 HOUR CARE'**

**13 November 2019**

We note that the Decision of 2 September 2019 ([2019] FWCFB 6067) stated that it was the Commission's provisional view that clause 25.8 '24 hour care' of the *Social, Community, Home Care and Disability Services Industry Award 2010* ('the Award') be retained, but found that the existing clause does not provide a fair and relevant minimum safety net [paragraph 104].

Our principle position remains that clause 25.8 should be deleted.

If the Commission determines that clause 25.8 is to remain in the Award, we propose the attached clause ('union proposed clause').

Bar two exceptions, we do not support the proposal of ABI and others, and supported by NDS, as attached to their email of 8 November 2019 ('ABI proposed clause').

**Areas of agreement**

We agree with the following sections of the ABI proposed clause:

- 25.8(b) –it is appropriate that a 24 hour care shift should only be worked by agreement and;
- 31.2(b) –we agree that employees who regularly work 24 hour care shifts should be classified as a shift worker for the purposes of the NES. For clarity, we propose that '*regularly*' is defined within the sub clause as follows: '*For the purposes of this sub clause, an employee will regularly work 24 hour care shifts if the employee works four or more 24 hour care shifts during the yearly period in respect of which their annual leave accrues.*'

Clauses 25.8(a) and 31.2(a) in the ABI proposed clause reflect the terms of the Award as it is. We do not propose any amendment to these clauses.

**Areas of disagreement**

Unpaid hours of work

The most significant deficiency with the ABI proposed clause (as in the current clause 25.8) is that it enables an employer to require an employee to be at work for 24 hours without payment for that whole period of work.

ABI's clause conflates the provision of 8 hours active 'care' for clients with 8 hours 'work'. In our view, the whole time an employee is at a client's home and available for duty is work, whether they are actively providing care, or waiting to provide care.

In our view, a provision in a modern award that enables an employer to require an employee to be present at work, but does not provide payment for all such hours of work, cannot be considered a '*fair and relevant*' minimum safety net, as it effectively requires the employee to work a period of time for free. Clause 25.8 of the Award effectively provides that an employee is paid 12.4 ordinary hours pay for 24 hours work. This is a significant deficiency in the current clause, and it is particularly egregious when considering that home care workers are largely low paid.

If the Commission retains clause 25.8, provision must be made for payment for *all* hours of work within the 24 hour period. The union proposed clause addresses this by providing for:

- 16 hours of payment at 155% of the employee's appropriate rate of pay (h)(i));
- a sleepover allowance for the 8 hour sleep break portion of the shift (f); and
- ensuring all hours of work in the shift are treated as such for all purposes (j)

This ensures that the employee will be compensated for all hours of work.

The payment in sub clause (h)(i) of the union proposed clause at the rate of 155% is to compensate for the disutility of being present at work for a 24 hour period, a period that is unusually long and can fairly be considered '*unsocial*'.

#### Care work

ABI's proposed clause does not contain a definition of care work. The union proposed clause contains a definition at subclause (b). A definition is necessary as the current clause provides a limit of 8 hours 'care', yet some of the tasks the employee will be required to do whilst performing a 24 hour care shift may not be contained in the care plan. Such tasks include: making a cup of tea, answering the phone or making phone calls for the client, doing washing, making notes on the client, or other necessary tasks to assist the client that may arise over the 24 hour period but may not have been considered in the care plan.

#### Sleep break

ABI's proposed clause (clause 25.8(c)) retains the current clause's provision that an employee '*will normally*' have the opportunity to sleep. This is ambiguous, and raises the question of when an employee will not be able to sleep, and what compensation there is for the loss of sleep. This provision is inferior to the sleepover provisions in the current Award clause 25.7 (which provides for an overtime payment where an employee is woken up at sub clause 25.7(e)).

An employee working a 24 hour shift should be afforded the opportunity to sleep, and there should be a penalty if an employee is woken up. Sub clauses (d) to (g) of the union proposed clause provide for more appropriate sleep arrangements and conditions than ABI's proposed clause.

The union proposed clause at sub clause (d) provides that the employee will be provided with basic amenities when working a 24 hour care shift including:

- (i) a separate and securely lockable room with a peephole or similar in the door, a bed and a telephone and internet connection in the room;*
- (ii) a bed, bedside lamp and clean linen;*
- (iii) access to food preparation facilities;*
- (iv) access to appropriate temperature control; and*
- (v) free board and lodging.*

Sub clause (e) of the union proposed clause provides an appropriate structure for the sleep break portion of the shift, by ensuring that the sleep break will occur during regular sleeping hours.

Sub clause (f) provides payment for the sleep over portion of the shift and is consistent with how sleepover shifts are paid in the Award.

Sub clause (g)(i) provides that there will a penalty of double time in circumstances where the employee is woken up during the sleep break.

#### Additional care work

ABI's proposed clause at sub clause (e) states that where an employee is required to provide more than 8 hours care, such work will be treated as overtime in accordance with clause 28.1.

The union proposed clause at sub clause (g) (ii) provides that where an employee is required to perform more than 8 hours of care, the employee will be paid double time (which is in lieu of the 155% penalty otherwise applicable).

The union proposed clause is more appropriate. The overtime rate for part time and casual employees in clause 28.1(b)(ii) is time and a half for the first two hours and then double time thereafter, after ten hours of work per day.<sup>1</sup> In ABI's proposed clause, there is ambiguity about what the rate of payment is from hours eight to ten, and even if that were resolved, an employee would have a reduction in pay for the first two hours of overtime (from 155% to 150%).

#### Meal breaks

ABI's proposed clause does not make any provision for meal breaks. The union proposed clause provides at sub clause (h)(ii) that employees will receive three meal allowances to compensate for the fact that they are not necessarily able to leave the client premises and have actual meal breaks.

#### Breaks between shifts

The union proposed clause (at sub clause (k)) contains a provision by which an employee can elect to have a break of not less than 10 hours between the end of one 24 hour care shift and the start of another period of work. No such provision is contained in ABI's proposed clause. This sub clause is important in ensuring that employees are able to have appropriate breaks in between periods of work.

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<sup>1</sup> For part time and casual employees in clause 28.1(b)(i), except on Sundays and public holidays. Different provisions apply to full time employees in clause 28.1(a).

### Refusal to work more than 8 hours

One issue raised by the Full Bench in the 2 September 2019 decision was how an employee is able to refuse to work more than 8 hours during a 24 hour care shift.<sup>2</sup> ABI have sought to address this in their sub-clause (f); however, in our view this is inadequate in addressing this issue.

Firstly, it only provides that an employee may refuse to work the extra hours where they are 'unreasonable'. But in practice, it is difficult to imagine how an employee could refuse to perform additional work when they are employed to be one-on-one with a client in their home, and how 'reasonableness' can be assessed in this circumstance.

Secondly, it does not address what should happen if an employee has already completed 8 hours care but the 24 hour period is not completed. According to this clause, the employee is not able to simply finish their shift and return home but must remain, available for duty, at the client's home for the remainder of the 24 hour period.

The approach of the unions is to provide for adequate penalties in the clause to compensate for the fact that in practice, an employee is not genuinely able to refuse to perform more than 8 hours care.

### Accrual of hours

A further deficiency with the ABI proposed clause is that an employee will only be deemed to have accrued 8 hours of work for the purposes of calculating entitlements to annual leave, personal leave, and other entitlements. However, they are in practice required to be at work for a 24 hour period.

According to ABI's clause, employees working 24 hour shifts will be paid overtime for work performed above 8 hours, but these overtime hours do not accrue entitlements. This disadvantages employees working such 24 hour shifts as they are required to spend long hours at work, will likely be required to provide more than 8 hours of care, and may or may not have the opportunity to sleep and rest. Yet the employees will only accrue entitlements for one third of the time they spend at work. Working such long shifts is also likely to make employees tired and less able to take on additional (paid) shifts in the week.

The unions have attempted to address this deficiency in ABI's clause with our sub clause (j), which states that *'For each 24 hour care shift, the employee will be treated for all purposes as having performed 24 ordinary hours of work.'*

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<sup>2</sup> [2019] FWCFB 6067, [103].

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FAIR WORK COMMISSION

## DRAFT DETERMINATION

*Fair Work Act 2009*

Part 2-3, Div 4 – 4 Yearly reviews of modern awards

### **Social, Community, Home Care and Disability Services Industry Award 2010**

(ODN AM2014/285) MA000100

Health and Welfare

<<PLACE, MONTH, YEAR>>

Review of modern awards to be conducted.

A. Further to the Full Bench decision issued by the Fair Work Commission on DD MM YYYY, the above award is varied

[1] By deleting clause 25.8 – 24 hour care and inserting the following:

*This clause only applies to home care employees.*

- (a) *A **24 hour care** shift requires an employee to be available for duty in a client's home for a 24 hour period. During this period, the employee is required to provide the client with the services specified in the care plan. The employee is required to provide a total of no more than eight hours of care during this period.*
- (b) *For the purposes of this clause, "care" shall mean the performance of any task that assists a client with daily living.*
- (c) *An employer may only require an employee to work a 24 hour care shift by agreement.*
- (d) *During a 24 hour care shift, the employee will be afforded the opportunity to sleep for a continuous period of eight hours (the "sleep break") during a 24 hour care shift and will be provided with:*
  - (i) *a separate and securely lockable room with a peephole or similar in the door, a bed and a telephone and internet connection in the room; and*
  - (ii) *a bed, bedside lamp and clean linen;*
  - (iii) *access to food preparation facilities; and*
  - (iv) *access to appropriate temperature control and*
  - (v) *free board and lodging.*

- (e) *The sleep break shall not commence earlier than 10pm and shall not finish later than 7am.*
- (f) *An employee required to work a 24 hour care shift will be paid the sleepover allowance prescribed by clause 25.7.*
- (g) *In the event that:*
  - (i) *the sleep break is interrupted by the client for any reason, whether to deliver services specified in the care plan or not; or*
  - (ii) *the employee is otherwise required to provide more than eight hours of care;*

*the employee shall be paid double time for the period of such interruption or the provision of such care, with a minimum payment of one hour.*
- (h) *In addition to the above, for each 24 hour period, the employee will be paid:*
  - (i) *16 hours at 155% of their appropriate rate and;*
  - (ii) *three meal allowance payments prescribed by clause 20.3.*
- (i) *An employee who regularly works 24 hour care shifts during the yearly period in respect of which their annual leave accrues will be deemed to be a shiftworker for the purpose of entitlement to annual leave pursuant to the NES.*
- (j) *For each 24 hour care shift, the employee will be treated for all purposes as having performed 24 ordinary hours of work.*
- (k) *An employee will be allowed, at their election, a break of not less than 10 hours between the end of one 24 hour care shift and the start of another period of work.*

[2] By deleting clause 31 .2 –Quantum of leave and replacing it with the following:

*For the purpose of the NES, a shiftworker is:*

- (a) *an employee who works for more than four ordinary hours on 10 or more weekends during the yearly period in respect of which their annual leave accrues; or*
- (b) *an employee who regularly works 24 hour care shifts in accordance with clause 25.8 (for the purposes of this sub clause, an employee will regularly work 24 hour care shifts if the employee works four or more 24 hour care shifts during the yearly period in respect of which their annual leave accrues)*

*and is entitled to an additional week's annual leave on the same terms and conditions*

**B.** This determination will come into operation from DD MM YYYY.